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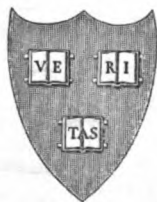
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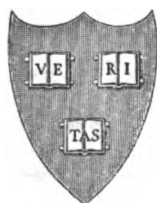


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TABLE OF CONTENTS.

ABSTRACTS OF CASES ..57, 141, 216, 284, 365, 424, 498, 562, 624, 707,
804, 901

ANNOTATIONS AND LEADING CASES.

ADDITIONAL DAMAGES FOR CHANGE OF PLAN. <i>Merritt Starr</i>	536
Chicago & Western Ind. R. R. Co. v. Coggsell. <i>Illinois Appellate Court.</i>	
ADMISSIBILITY OF CONFESSIONS AS EVIDENCE. <i>Henry N. Smalts</i>	776
Early v. Commonwealth. <i>Supreme Court of Appeals of Virginia.</i>	
AGREEMENTS FOR COMPENSATION BETWEEN ATTORNEY AND CLIENT. <i>H. Gordon McCouch</i>	751
Pierce v. Kyle. <i>Supreme Court of Ohio.</i>	
AUTHORITY OF THE TILDEN WILL CASE OUTSIDE OF NEW YORK STATE. <i>Howard W. Page</i>	123
Tilden v. Green. <i>Court of Appeals of New York.</i>	
CONTRIBUTORY NEGLIGENCE. <i>Wm. Wharton Smith</i>	266
Lake Shore & M. S. Ry. Co. v. Bodeman. <i>Supreme Court of Illinois.</i>	
DONATIONES CAUSA MORTIS. <i>John A. McCarthy</i>	681
Thomas Adm'r v. Lewis et al. <i>Supreme Court of Virginia.</i>	
DOWER, ANTE-NUPTIAL RELEASE OF. <i>Alfred Rowland Haig</i>	831
Pulling's Estate — Lothrop's Appeal. <i>Supreme Court of Michigan.</i>	
GERRYMANDERING. <i>R. D. S.</i>	851
People ex rel. Carter v. Rice, Secretary of State. <i>Court of Appeals of New York.</i>	
LAW OF THE FLAG. <i>Horace L. Cheyney</i>	193
The "August." <i>High Court of Justice, Probate Division.</i>	
LEVY ON GROWING CROPS. <i>R. D. S.</i>	602
Sparrow v. Pond. <i>Supreme Court of Minnesota.</i>	
LIABILITY OF EMPLOYER FOR TORTS OF AN INDEPENDENT CONTRACTOR. <i>Ardemus Stewart</i>	352
Bibb's Adm'r v. N. & W. R. R. <i>Supreme Court of Appeals of Virginia.</i>	
MECHANIC'S LIENS. <i>Benjamin H. Lowry</i>	390
Taylor v. Murphy. <i>Supreme Court of Pennsylvania.</i>	
NATURAL USE OF LAND, THE. <i>George Wharton Pepper</i>	38
Robb v. Carnegie. <i>Supreme Court of Pennsylvania.</i>	
OFFENCES AT COMMON LAW. <i>C. Percy Wilcox</i>	868
Commonwealth v. Randolph. <i>Supreme Court of Pennsylvania.</i>	

PROPER REMEDY FOR AN INTERFERENCE WITH THE RIGHT OF ACCESS TO PUBLIC RECORDS, THE. <i>Ar-</i> <i>demus Stewart</i>	769
West Jersey Title, etc., Co. v. Barber. <i>Court of Chancery of</i> <i>New Jersey</i> .	
PURCHASES BY TRUSTEES AT ADVERSE SALES. <i>Robert P.</i> <i>Bradford</i>	743
Mullen, Trustee v. Doyle <i>et al.</i> , Appellants. <i>Supreme Court of</i> <i>Pennsylvania</i> .	
RIGHT OF ADMINISTRATOR TO MAKE TRANSFERS. <i>Maurice</i> <i>G. Belknap</i>	878
Solinsky v. Fourth Nat. Bank of Grand Rapids. <i>Supreme Court</i> <i>of Texas</i> .	
RIGHT OF REAL ESTATE BROKER TO COMMISSIONS. <i>R. D. S.</i>	758
Garcelon v. Tibbets. <i>Supreme Judicial Court of Maine</i> .	
SET-OFF IN INSOLVENCY. <i>Horace L. Cheyney</i>	483
Nashville Trust Co. v. Fourth National Bank. <i>Supreme Court</i> <i>of Tennessee</i> .	
SOCIAL CLUBS AND THE LIQUOR LAWS. <i>Mayne R. Long-</i> <i>streth</i>	861
Commonwealth v. Tierney. <i>Supreme Court of Pennsylvania</i> .	

BOOK REVIEWS.

AMERICAN DIGEST, THE.....	211
BALLARD ON REAL PROPERTY.....	544
BEACH ON PRIVATE CORPORATIONS.....	493
BLACK ON INTOXICATING LIQUORS.....	799
BOISOT ON BY-LAWS OF PRIVATE CORPORATIONS.....	900
CAMPBELL ON PURITAN HISTORY.....	546
CHAPMAN'S MEDICAL JURISPRUDENCE AND TOXICOLOGY.....	897
CHASE'S LEADING CASES IN TORTS.....	801
COX'S MANUAL OF TRADEMARK CASES.....	898
DARLINGTON ON PERSONAL PROPERTY.....	52
FINCH'S INSURANCE CASES.....	545
GOULD'S STORY'S EQUITY PLEADINGS.....	543
LAMBERTENGHI'S IL DIRRITO COMMUNE.....	544
LAWSON'S LEADING CASES.....	416
LEWIS ON THE FEDERAL POWER OVER COMMERCE.....	412
LEWIS'S AMERICAN RAILROAD AND CORPORATION REPORTS.....	553
MURPHY ON CORPORATIONS.....	415
ORDRONAUX ON CONSTITUTIONAL LAW.....	129
PATTERSON ON CONTRACTS IN RESTRAINT OF TRADE.....	209
PEPPER ON PLEADING.....	362
RICHARDS ON INSURANCE.....	420
RENO ON NON-RESIDENTS AND FOREIGN CORPORATIONS.....	704

EDITORIAL NOTES.

AMERICAN LAW REGISTER AND REVIEW, THE.....	612
CIRCUIT COURTS OF APPEAL.....	45
THE DEATH OF PRESIDENT AND VICE-PRESIDENT.....	702
INJUNCTIONS TO RESTRAIN LIBELS AND COURTS OF CRIMINAL EQUITY.....	782

JURISDICTION OF THE SUPREME COURT OVER POLITICS.....	403
JUSTICE BRADLEY.....	203, 270
LAU OW BEU, PETITIONER, IN RE.....	48
MEMBERSHIP OF THE NEXT ELECTORAL COLLEGE.....	700
MUST A SOCIAL CLUB TAKE OUT A LICENSE.....	892
NEGLECTANCE AND THE APPELLATE COURTS, THE QUESTION OF...	407
A NEW STATE TAX.....	406
RAILWAY CO. v. STATE OF MAINE.....	203
READING RAILROAD LEASES, THE.....	270
RIGHT OF CONTRACTING WITH CITIZENS OF OTHER STATES.....	208
STARR DECISIS.....	489
TILDEN v. GREENE.....	203
WM. WHARTON SMITH, ESQ., IN MEMORIAM.....	488

LEADING ARTICLES.

AMERICAN JURISPRUDENCE. <i>Simeon E. Baldwin</i>	644
ANTHRACITE TRADE SITUATION—THE PROBLEM BEFORE THE COMMISSION. <i>Thomas L. Greene</i>	145
BEHRING SEA CONTROVERSY, THE. <i>Henry Flanders</i>	590
BEHRING SEA CONTROVERSY, THE BRITISH SIDE OF THE. <i>Lawrence Godkin</i>	713
BEHRING SEA CONTROVERSY, THE AMERICAN SIDE OF THE. <i>Stephen B. Stanton</i>	809
BELIEF IN THE PRETERNATURAL AND ITS EFFECT UPON DISPOSITIONS OF PROPERTY. <i>Ardemus Stewart</i> .	
1. Conveyances, <i>Inter vivos</i>	505
2. Testamentary Dispositions	569
BILL OF LADING, ADOPTION OF A UNIFORM, BY INTER- NATIONAL CONFERENCE. <i>Morton P. Henry</i>	633
BOUNTY ON SUGAR, CONSTITUTIONALITY OF. <i>William Draper Lewis</i>	301
CONSTITUTIONALITY OF THE RECIPROCITY CLAUSE OF THE MCKINLEY TARIFF ACT. <i>C. Stuart Patterson</i>	65
CRIMES AND THEIR PUNISHMENT. <i>Hampton L. Carson</i> ...	458
EQUITY JURISDICTION AS APPLIED TO CRIMES AND MIS- DEMEANORS. <i>Richard C. McMurtrie</i>	1
INTERSTATE COMMERCE COMMISSION BEFORE THE FED- ERAL COURTS, THE. <i>Crawford Hening</i>	156
LEGISLATIVE AND JUDICIAL POWER, DISTINCTION BE- TWEEN. <i>William Hamilton Cowles</i>	433
MORICE v. BISHOP OF DURHAM, RULE IN. <i>Richard C. Mc- Murtrie</i>	522
MORTGAGES EXECUTED UNDER POWERS TO SELL LANDS AND PAY DEBTS. <i>Daniel Waite Howe</i>	17
PENNSYLVANIA DEFEASANCE ACT OF 1881, AND THE CASE OF SANKEY v. HAWLEY. <i>C. Stuart Patterson</i> ..	378

PROCEDURE IN EARLY CRIMINAL TRIALS. <i>Hampton L. Carson</i>	371
RAILROAD LEASES TO CONTROL THE ANTHRACITE COAL TRADE, THE. <i>Sydney G. Fisher</i>	289
RECIPROCITY ACTS OF 1890 — ARE THEY CONSTITUTIONAL? <i>Edward B. Whitney</i>	173
"RES ADJUDICATA." <i>E. T. Merrick</i>	611
SHYLOCK <i>v.</i> ANTONIO—JUDGMENT AFFIRMED. <i>George Wharton Pepper</i>	225
SUNDAY LAWS IN THE UNITED STATES. <i>James T. Ringgold</i>	723
TILDEN <i>v.</i> GREEN, EXAMINATION OF DECISION IN. <i>Richard C. McMurtrie</i>	235

NOTES AND COMMENTS.

HOMESTEAD RIOTS, THE. <i>J. Percy Keating</i>	556
METHODS BY WHICH THE STATES MAY TAX INTERSTATE COMMERCE. <i>Francis Cope Hartshorne</i>	496
A NEW CRITERION OF CONTRACT. <i>Richard C. McMurtrie</i>	364
O'NEILL <i>v.</i> THE STATE OF VERMONT. <i>Sentinel</i>	619
POWER OF THE STATE OVER THE RIGHT OF CONTRACTING. <i>Richard C. McMurtrie</i>	213

THE AMERICAN LAW REGISTER.

JANUARY, 1892.

EQUITY JURISDICTION APPLIED TO CRIMES AND MISDEMEANORS.

BY RICHARD C. MCMURTRIE, ESQ.

" For an evil which is not felt, and which is, therefore, considered a trifle and little thought of, draws after it consequences only so much the more disastrous " (Wickliff, as quoted by Neander).

Some time since a distinguished judge, now dead, went out of his way to commend, in the name of the Supreme Court of the United States, the new departure in criminal legislation and the administration of criminal justice in extending the jurisdiction and forms of procedure of courts of equity to the statutory misdemeanor of selling intoxicants. At that time an article was inserted in the *Evening Post*, of New York, deprecating the legislation and the commendatory expressions of the Supreme Court. A learned judge requested that the objections should be pointed out. Not that he doubted as to the impropriety of the legislation, but as it is evident that when such a court as the Supreme Court of the United States allowed a commendation by one of its number, while speaking for the whole bench, to pass unchallenged, it is impossible to rely on the mere legal instinct as sufficient to condemn it.

The commendatory expressions referred to are found in the case of *Eilenbecken v. Plymouth County*.¹

Before speaking of this case, it may be said that it is quite evident, from reports of judgments in the daily press, that many judges are assuming to use the forms of equity jurisdiction over crimes—not, of course, of crimes generally, this would be an absurdity too great—and also in matters to which the same objections exist, as in the particular instance to which I refer—political elections, strikes of workmen, etc. Believing this subject belongs to political jurisprudence, and that its importance is measured only by the value of the rule that removes criminal jurisprudence from even the apparent caprice of the judiciary and compels the intervention of a public trial with the witnesses and the accused brought face to face, a jury to determine the facts, the public discussion of the admissibility and effect of evidence, and a fixed standard of punishment, with a right to a review and to an appeal to the pardoning power, I now propose to point out the one sufficient objection to the new system.

It may be well to state the particulars of the case of *Eilenbecken v. Plymouth County*.

Iowa, by a statute, prohibited the selling or other distribution of intoxicants. It then conferred on the courts the power of a Court of Chancery to deal with the violation of the statute. For this purpose it declared the act of selling to be a nuisance, as also the place where it was done, and, while limiting the penalty, it gave the court the power to restrain the sale by an injunction and to punish the breach of the mandate like a court of equity. There are absurdities and iniquities in the statute that seem incredible. The provisions that have had the approval of the Supreme Court, however, have alone been stated. The suppressed provisions might well be referred to as illustrating the disastrous consequences that may follow from a disregard of the rule on which, more than

¹ 134 U. S., 31. An abstract of this case and the commendatory expressions of the Court referred to will be found in note at the end of this article.

on anything else, all civil and political liberty depends,—the reputation for purity of the judiciary itself; and also the consequences of committing legislation to persons who apparently are ignorant of the foundations of that liberty.

To enable one not a lawyer to comprehend the question it is necessary to say this much as to what is called chancery or equity jurisdiction. It is an exceptional jurisdiction. It was designed to furnish a kind of redress that the law did not and could not give; to deal with rights of property not recognized by the law, but established by courts of equity. It has always, and by every author or court been recognized as confined to matters of property, and to cases where the law failed to furnish an adequate remedy, and never to have any right to interfere in respect to the rights of persons as distinguished from property, much less with crimes or anything involving persons or personal liberty. Its mode of procedure differs from that of the law. Its remedies are as wholly different as the compelling of the doing of an act differs from merely exacting compensation as estimated by a jury for not doing it. And out of this, and as a part of this very exceptional and peculiar power of compelling the delivery of a specific thing under penalty of imprisonment until it is delivered, or restraining or compelling the performance of an act under the same penalty, there was invented a writ or form of procedure called injunction, which is simply a writ commanding the doing or prohibiting the doing of some defined act which is enforced by imprisonment at the discretion of the judge. The disobedience is called *contempt*, that is disregard of the command of the judge.¹

The capacity to determine whether there is a violation of this order depends upon the discretion of the judge. It is not *necessary* that there shall be a trace left of the proof or evidence, for it may all be by unwritten testimony, and it may all be *ex parte* without the accused seeing the witnesses or having an opportunity to ask them a single question.

Now this system, confined as it has been to mere mat-

¹ See 35 Ch. Div., 455.

ters of property—to commands not to do some particular act relative to property, such as not to negotiate a bill, or not to build or not to pull down until a final hearing—has never been complained of. On the contrary, it is one of the most useful of all the forms given us for administering justice, and this arises from the fact that passions are excluded when the rights of property alone are under consideration, and the remedy is a provisional, temporary and protective remedy only. Is it wise or prudent, is it consistent with the great fundamental laws that protect civil liberty, to extend this sort of remedy to crimes and misdemeanors? And if it is inconsistent with these, is that not a sufficient objection?

It may be that the uniform voice of the equity lawyers of England, where the system originated, and by whom alone it has been formed, will, with some people, be sufficient to condemn this extension of equity jurisdiction. Not one solitary feature in the system arises through legislation. It is all judge-made law, and it is submitted that the recognition by the equity judges of England of the limitation on equity jurisdiction clearly implies their belief that it ought to be so limited, seeing that they alone have ever attempted to set the limits to their own jurisdiction.

That there is no jurisdiction in a court of equity to prevent crime or any act *because it is criminal* was distinctly decided by Lord ELDON, in *Lee v. Pritchard*.¹ It was also there decided that the publication of a libel could not be prevented by a court of equity. It is important for our present purposes to observe that at the same time it was decided that there was nothing in the way of the Court preventing the publication or the doing of the act because it is a crime, if these prohibitions are necessary for *the protection of property*. This principle was recognized by Chancellor KENT, and, in fact, made the basis of a great judgment.² It was also recognized and applied in *Springhead v. Riley*,³ in 1866, showing that under the reformed

¹ 2 Swanston, 440 (1818).

² Attn.-Gen. v. Utica Ins. Co., 2 Johnson's Rep., 271.

³ L. R. 6 Eq., 558.

law no change had taken place in this fundamental rule, nor had the supposed fusion of law and equity produced such a revolution as to permit the application of equity forms and processes to matters involving personal liberty or merely to illegal and injurious acts not affecting property. The authority is not a very high one ; but the precise point was clearly stated and abundantly fortified by authorities there cited to maintain the proposition, that *the jurisdiction of this Court is to protect property*. The distinction as to when a trespass can and cannot be prevented,¹ the trespass must amount to waste, that is, an injury for which damages are not a compensation.² When forged notes may or may not be restrained, citing *Austria v. Day*.³ In this case the eminent patriot Kossuth was preparing to wage war by flooding his enemies' country with forged currency. The jurisdiction to restrain this as an invasion of the prerogative was disclaimed, as was any jurisdiction in political cases, or because a revolution would result. A quotation is given from this judgment containing the reason upon which the judgment was rested : "I agree" (it is here Lord CAMPBELL who speaks) "that the jurisdiction of this Court in a case of this nature rests on injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property." Then there is a citation from Lord ELDON'S judgment in *Macauley v. Shackell*. "*This Court has no criminal jurisdiction*, but it lends its assistance to a man who has in view of the law a right of property, and who makes out that an action at law will not be sufficient remedy and protection"

There is no more perfect illustration that property, and that alone, is the subject of equity jurisdiction than the judgment of Lord LANGDALE, in *Clark v. Freeman*,⁴ coupled with the comment of that great lawyer, Lord CAIRNS, in

¹ *Lewdes v. Bette*, L. J., Ch. 451, by Kindersley, V.C.; *Turner v. the Highway Board*, 18 U. R., 424.

² 3 D. F. & I., 217.

³ 1 Bl. N. S., 76, 127.

⁴ 11 Beavan, 113.

Maxwell v. Hogg.¹ The decision was that the manufacture and sale of spurious pills under a false representation that they were made under a prescription of Sir James Clark could not be enjoined. Lord CAIRNS' comment was that Sir James might be said to have a property in his own name to warrant the interference. Certainly the pills ought to bear the palm as against the whiskey if the sale of either could constitute a nuisance. The judgment reviewed in this case was a very singular one, and savored altogether of the line of reasoning that, with regret, we are very familiar with in this country leading to this proposition, that boycotting and its tribe of crimes could be enjoined because they are injurious to property. In *Prudential v. Knott* these cases will be found to be thus characterized: "The Vice-Chancellor, in his desire to do what was right, was led to exaggerate the jurisdiction of this Court in a manner for which there is no authority in any reported case, and no foundation in principle."² The decision cited deserves notice, it being that of Lord Cairns, Sir W. M. JAMES and Sir G. MELLISH: *There is no jurisdiction to restrain the publication of a libel, even though it affects rights of property.*

There is a passage in the judgment of KNIGHT-BRUCE, V.C., in *Soltau v. Deheld*,³ which perfectly illustrates the exceptional character of the jurisdiction. An injunction was asked to restrain a nuisance by the ringing of bells; one of the reasons urged was that the ringing of the bells of Roman Catholic churches was illegal. He said: "That is perfectly immaterial . . . because if it be illegal I am not to grant an injunction to restrain an illegal act merely *because it is illegal*. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering." Suppose we extend the jurisdiction to theft or even to gambling. Is it nothing to have a public order made on a particular person commanding him to abstain

¹ L. R. 2 Ch., 310.

² 10 Chanc., 142.

³ 2 Sim. N. S., 153-4.

from stealing or gambling? The utmost limit of punishment for the most malicious suit of this kind is the payment of costs; and if we yet introduce the securities given by the common law against similar accusations, which the courts cannot, we may ask, why make the change in the forms of criminal procedure, except to conceal the real purpose?

There is a striking passage or sentence of Lord LANGDALE, in *Ryves v. the Duke of Wellington*,¹ that may be of service to gentlemen who conceive that whenever the law fails to produce the result they desire the remedy may be had in equity. In that case the Probate Judge had refused to make an order on George IV to produce and prove the will of George III, because there was no precedent to compel the wearer of the crown to produce and prove the will of his predecessor. The Duke of Wellington was the executor of George IV. This was the equity of the bill, to compel payment by the executor of the person who had suppressed the will of his father. Lord LANGDALE said: "It was argued that if no remedy can be obtained here, the law of England does not afford any remedy for an alleged wrong, such as is stated on this record. I may observe that the absence of a remedy for a supposed wrong in another place is not, of itself, any reason for this Court assuming a jurisdiction on the subject; the case must be such as to bring it properly within the jurisdiction of this Court on other grounds."

There is a passage in a judgment of a man who stands second to none in the estimation of the Bar and Bench of the United States that may possibly be deemed of weight on this point. It is not a *dictum*, it is a *ratio decidendi* of a very important case. It is the decision of Chancellor KENT, of New York, in *Atty.-Genl. v. the Utica Ins. Co.*,² that a court of equity has no jurisdiction over offences against a public statute, and could not restrain the violation of an act prohibiting unincorporated banking associations from issuing bills to be used as currency. The real

¹ 9 Beav., 600.

² 2 Johnson's Ch. R., 361.

point of the judgment, apart from precedents, and the replies to the sophistical use of the elementary rules defining the jurisdiction by misapplying them and perverting the meaning of words, lies in this sentence: "If a charge be of a criminal nature or of an offence against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this Court, which was intended to deal only in matters of *civil rights* resting on equity, or where the remedy at law is not sufficiently adequate."¹ The legitimate subject-matter of equity lies in the two words that have been italicised. And when the origin of the jurisdiction is considered—that it is exceptional and of grace, not of right—and also when we consider the forms or mode of administration and the remedies, no one will question that there is ample reason for confining such a jurisdiction to mere matters of property. At the close of the judgment, which well deserves reading by those who are willing to believe that a thorough study of the subject and long experience in the administration of justice, both as a common-law and equity judge, entitle a man to have an opinion, and that opinion to carry weight, there is this sentence: "The whole question upon the merits is one of *law*, and not of *equity*. The charge is too much of the nature of a misdemeanor to belong to this Court." This is as pregnant with the negative principle of equity jurisdiction as were the two words that have been italicised with the affirmative.

It may be permitted here to add, if one were to desire to exhibit this emanation of American politics in all its grotesqueness, a case reported in 4th Wallace, *State of Mississippi v. Johnson*.² The scheme was of the same stamp as the legislation of Iowa, and also the judicial comments on that piece of statesmanship.

It was an attempt to obtain an injunction from the Supreme Court of the United States restraining the President from enforcing certain acts of Congress on the ground of their unconstitutionality. The Chief Justice (CHASE)

¹ 2 Johnson's Ch. Rep., 378.

² Page 476.

was probably quite competent to point out the absurdity of employing equity jurisdiction for such purposes. And it was most unfortunate that he did not condescend to use the instrument that such folly and ignorance deserved. He, however, did not attempt to ridicule the peculiar absurdity of calling in aid the jurisdiction of equity to determine (1) a pure legal question, (2) a political question, (3) a question of criminal law determinable by another department of the government. He preferred taking the higher ground and, no doubt, the wiser one. He rested the case upon the total want of power in the judicial department to undertake to control the Executive in anything that involved discretion. Impliedly, he said, or rather the Court decided, that the question of the legality of an act of Congress in reference to matters of government could not be discussed by the judicial department of the government before some overt act, and then only by action, indictment or impeachment. He pointed out that there was another tribunal appointed for this purpose by the law, if the criminal held official position, viz. : the Senate, on an impeachment, and they might impeach for not obeying while this Court was prohibiting obedience. And he contented himself by simply denying the power to enjoin the President in the performance of his official duties, and with one touch of ridicule by quoting the words of his great predecessor, MARSHALL, "an absurd and excessive extravagance," as justly characterizing an attempt by the judicial tribunal to enforce executive and political duties.

There was thus, however, lost an opportunity for speaking out by one that could not but be listened to even if not comprehended, and of giving to the people of the United States some little conception of the inherent and essential features of the subjects proper to be committed to a court of equity. Had he but said, "Where is the equity of this bill, and what do you understand by that word you are always repeating, and do you have any real conception of its meaning?—certainly the draughtsmen of this bill had not—did any one before ever conceive that illegality creates an equity?—it may be an essential element in the

equity, but if illegality constitutes or creates the equity there can be no wrong or crime that is not within the jurisdiction, yet it is only when the law cannot give the proper redress that such a jurisdiction exists," he would have rendered essential benefit to American jurisprudence. Possibly he may have apprehended that he would be giving support to the notion that the form of the remedy only was mistaken; and if he was dealing with a bar whose brains were sufficiently addled to try the experiment of a *mandamus*, he was very wise to extinguish all hope of involving the judiciary in the absurd attempt to administer the government as if it were an insolvent corporation.

If any should say the English judges gave no reason for these limitations to equity jurisdiction, it is sufficient to reply that they were speaking to an educated class to whom the reasons were self-evident. When we find Lord ELDON taking infinite pains to explain when and where and under what circumstances and for what reason he is justified in interfering to prevent the destruction of property, and not to put the man to an action for damages, we may be quite sure that he saw a reason and a serious one for the rule. If the jurisdiction is improper in the case of a most vexatious trespass, such as entering into private grounds or going over enclosures, must not the same objections exist to similar acts when rising to the dignity of a violation of the statute law? Those who commend the practice of extending the forms of equity procedure, and those who seek for the means for curtailing extension equally overlook these practical reasons.

But to comply with the request that has led to this paper, it is necessary to call attention to the subject in detail. It is not a sufficient reason against the new system, looking at the question as one of policy, or from the standpoint of politics, that such a jurisdiction has never before been exercised. That may be sufficient in a court—it may be none against the grant of the jurisdiction by a legislature. What has been said in reference to English jurists, including some of the most illustrious of our own, is to make it clear that they declined the jurisdiction and denied

its existence. But the purpose of this paper is not to defend the courts for declining the jurisdiction, but to state the reasons against its creation. The courts will readily acquiesce in a denial of a jurisdiction that has never been exercised, if it is seen to be of such a character that it is a violation of the fundamental principles of free government to confer it.

Equity jurisprudence as applied to crime and as distinguished from that of law is preventive only. Let us now look at what the jurisdiction would be were it not preventive. Injunctions would then be impossible, for, while there are such things as injunctions after the wrong done, they are confined, of course, only to the case where the wrong may be righted, and things replaced as they were ; as, for instance, a building may be erected contrary to a covenant, and the builder may be compelled to restore the land to its former condition.

And here it may be observed there is no pretence of a jurisdiction conferred to try or punish the offence created by the statute. It is because it is a preventive that it is commended in the opinion of the Supreme Court, and it is the preventive jurisdiction only that is supposed to be conferred. And yet I am aware of no crime or misdemeanor in which this preventive remedy by injunction is possible. Certainly it cannot be applied to an unlicensed sale of a dram. It is too absurd even for a joke. What, then, is the practical, what is the inevitable and necessary result of applying the preventive remedy? Look at it as it must occur. A person is suspected of an intention to do the forbidden thing. He is enjoined not to do it by a judge. If he does it he has committed two wrongs,—one is the violation of the prohibition in the statute ; the other is the violation of the command of the Judge not to violate the statute. It is the one single act that constitutes the disobedience. What is the immediate consequence? The command of the statute is overlooked and its violation is disregarded; or if that is punished, and also the disobedience to the judge's order, the man is punished twice for the same offence. There is, of course, nothing of prevention here.

If, however, punishment is dealt with as a preventive, then the disobedience, which consisted in doing what is prohibited by the statute, is punished after that kind of trial that does apply to the breach of an injunction. And what is that? A trial by affidavits—that is, by evidence given by witnesses—given in the form they see fit, without the form of conducting what is called a cross-examination—that is, by asking questions explanatory of the statement. And in what respect is this preventive; except as the fear of punishment is preventive, and how does this differ from the fear of the sentence of a court of law, saving that one has and the other has not a right to a trial by due course of law? It is difficult to make any one not accustomed to the administration of justice comprehend the importance of this, and how utterly absurd and iniquitous it would be to apply this system to what is really a violation of the criminal law. Apply it honorably—that is, as the courts of equity do apply it—and the whole thing would be a laughing-stock. The accused has but to deny the fact on affidavit. When has it been found that a defendant was committed for contempt after his denial of such a fact as this must be? And is it desirable to compel the accused to choose between perjury or committing himself?

The whole scheme is a most unworthy perversion of the forms of justice. It is a mere evasion of the principles of law, and these principles are those on which, with the writ of *habeas corpus*, the whole system of criminal jurisprudence as a matter of politics rests.

To make this plain, the following observations are sufficient: If the jurisdiction, to punish for a violation of the license law, when there is a violation, or for a violation of the prohibitions of all use of intoxicants, whether by sale or gift, is intended to be given to the Courts of Chancery, nothing whatever is done but to change the form of procedure by indictment to injunction. In imagining the jurisdiction is preventive the legislature is deceiving itself and the community. In place of an indictment and a public prosecution, a grand jury, a court using common law forms, which require a jury to determine the

fact, and a judge to determine all matters of law, including the sufficiency of the evidence and the nature of the proof, there are substituted a bill, answer, proofs in writing, and a hearing before a judge without the right of appeal.

If there is no constitutional guarantee of the right to the trial by jury, then there is nothing to prevent the legislature doing this as a matter of *power*. The only remark to be made is that it would be far better to give the same power to punish to the ordinary courts and by common law forms. No possible benefit will result from the novelty. The offence will be much more speedily and certainly punished by the common law courts. All that is effected by the change is to confuse men's notions, and impose an expensive and dilatory system in place of a speedy and cheap one. No one who has the slightest knowledge of equity can fail to see that what the Legislature of Iowa has done is simply absurd, except to evade a trial by jury. Was anything but this the real intention? It is the extraordinary powers of the Court of Chancery that the framers of these laws designed to apply to assist in suppressing the evil of dram-drinking, and to the enforcing the prohibitory laws of the State, concealing the fact that they had removed the right of trial by jury. So far as the punishment is concerned, that cannot differ because of the court which is to enforce it. It would be something worse than absurd to provide that a court of equity may impose a heavier penalty for a violation of a statute than a court of law is permitted to do.

There is another form of relief which the forms of equity furnish, that is one compelling some act to be done. It is, however, obvious that in reference to the violation of the law there can be nothing done after the violation but punish. To confer this jurisdiction on courts of equity, therefore, has no possible meaning or object but to sanction and punish a misdemeanor without the intervention of a jury. The objections, therefore, to this novelty begin and end with this change. If it is proposed and is deemed wise and proper to make this change in the forms of law, and to substitute a judge for the jury to try facts constituting

crimes or misdemeanors, it is idle to waste time declaiming on the mere nonsense of doing it in this round-about way. But no one can read the act and suppose that this was the real intention. It is the preventive remedy of Chancery Courts that was intended to be conferred, and which alone is in question.

It is immaterial as a question of power that no such thing has ever been done, or that such things are not within the jurisdiction of courts of equity. Legislatures may, if not restrained by a constitution, confer jurisdiction in this case on the courts of equity, as it may as to another crime. It may make all crimes punishable only by an action for damages, and it may enforce contracts by hanging for failure to perform.

Granting, therefore, the power, what are the objections? Precisely and solely these. The whole system of administering the criminal laws is changed in the one particular that we and our ancestors have thought essential to political freedom, and which the experience of the world proves there is no other sure support for that which is beyond all price—that is, assuring to the accused of any crime for which there can be fine and imprisonment imposed, a trial by jury, according to the course of the common law—that is, with the witnesses produced and examined in the presence of the accused and before the world.

If these things are not deemed important, there is nothing more to be said.

If the fact of a violation of the order of the judge not to sell is tried as a misdemeanor, nothing is gained by the grant of the jurisdiction. But it cannot be tried in that way. No court has jurisdiction to try for contempt but the one whose order is disobeyed. That court and judge must decide the facts as the forms of the jurisdiction conferred require. If this fact of the contempt is to be tried by a jury indirectly, the whole thing becomes so absurd as to be incapable of discussion. If it is not to be so tried, the real purpose of this legislation is to confer a jurisdiction over one class of misdemeanors on a judge who may try it on *ex-parte* evidence without opportunity for cross-examine.

Where will this stop? Will any one deny that the only justification pretended is that the tribunal appointed for such purpose declines convicting? Thus it comes to this. We are to introduce a system denounced as outrageous when applied, under the name of coercion, to a people avowing a determination not to enforce the law, merely to carry out one newly-conceived scheme of moral reform, because the community will not submit to such dictation. Is not this a prodigious political blunder? And what will become of the judiciary compelled to exercise what the people will believe to be merely a capricious power?

NOTE.

The case of *Eilenbecken v. District Court of Plymouth County*, reported in 139 U. S., 31, arose, like so many other cases which have been taken to the Supreme Court of the United States, out of the policy of that State in attempting to suppress the traffic in intoxicating liquors.

Section 1534 of the Code of Iowa, as amended by C. 143 of the Acts of the Twentieth General Assembly, is as follows :

Sec. 1534 : "In case of violation of the provisions of either of the three preceding sections or of Section 1525 of this chapter, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful manufacture, or sale, or keeping, with intent to sell, use or give away, of any intoxicating liquors, is carried on, or continued, or exists, and the furniture, fixtures, vessels and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided; and whoever shall erect, or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and, upon conviction, shall pay a fine not exceeding \$1,000 and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of Chap. 47, Title 25, of this Code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same; and any person violating the terms of any injunction granted in such proceeding shall be punished, as for contempt, by fine of not less than \$500 nor more than \$1,000, or by imprisonment in the county jail not more than six months, or by both, such fine and imprisonment in the discretion of the Court."

This statute thus declares it is a crime to sell liquor or to keep liquor for sale, and provides for prosecution according to common law forms. It provides that any citizen may further maintain an action in equity against any person who, he alleges, keeps liquor for sale, to abate or perpetually enjoin said person from a further violation of the law. The Court, whether convinced or not of the truth of the allegation, may grant an injunction restraining the person against whom the bill is filed from selling

liquor. For violating the terms of this injunction—in other words, for selling liquor or keeping the same for sale—the Court, on proof by affidavit of the fact of the violation, *having no personal knowledge of the facts*, shall adjudge him in contempt of court.

Unlike all other punishments for contempt, the maximum and minimum punishment is fixed by the statute.

With this law in force, on the eleventh day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of the plaintiffs in error, praying that they should be enjoined from selling or keeping for sale intoxicating liquors, including ale, wine and beer. On the 6th of July, the Court ordered the issue of preliminary injunctions as prayed. On the 7th of July, the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October, complaints were filed, alleging that the plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the Court ordered that a hearing be had at the next term of the Court upon affidavits; and on the eighth day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the Court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of the injunction issued in said cause, and the sentence of fine and imprisonment entered against them.

The Supreme Court of the State on a writ of *certiorari* affirmed this judgment. The third assignment of error, which was the only one of any importance, was, that the statute in question was void because in effect it deprived the plaintiffs, who are charged with selling intoxicating liquors, "of the equal protection of the laws, and it prejudices the rights and privileges of that particular class of persons, and denies to them the right of trial by jury, while in all other prosecutions the accused must first be presented by indictment, and then have the benefit of trial by jury of his peers."

The Court, per Mr. Justice MILLER, held, first, that the record did not show whether the plaintiffs would have been denied a trial by jury had they demanded it; and, second, that it was within the power of the Court to issue the injunction. The opinion of the late Mr. Justice Miller, however, goes far beyond this. He considers, in the first place, that the offence is one against the Court, and not against the statute. After deciding that a court has power to punish for contempt without intervention of a jury, the learned jurist continues:

"The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have right to trial by jury.

"We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the Court punishing

the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the Court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury, and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution."

The sentence to which Mr. McMurtrie refers, in the previous article, is found in the next to the last clause of the opinion of the Court, and is as follows :

"If the objection to the statute," says Mr. Justice MILLER, "is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors, which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, *so far as at present advised, it appears to us that all the powers of a court, whether at common law or at chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the Court in which this remedy shall be had. Certainly, it seems to us to be quite as wise to use the processes of the law and the powers of the Court to prevent the evil as to punish the offence as a crime after it had been committed.*"

It remains but to note that the case opens but leaves unanswered two interesting questions of constitutional law : First, whether a State can deprive her citizens of the right of a trial by jury according to common law forms ; second, whether a State, granting that she can abolish the jury system *in toto*, can abolish it in regard to a certain class of crimes, while retaining it in trial of other crimes.

Besides these constitutional questions, the Court, in the sentence above quoted, refused to decide the question raised by the counsel, and of which the foregoing article is so clear an exposition, viz. : whether the proceeding instituted by the statute is essentially a criminal proceeding.

W. D. L.

MORTGAGES EXECUTED UNDER POWERS TO SELL LAND TO PAY DEBTS.

BY DANIEL WAIT HOWE, ESQ.

WHEN POWER TO SELL INCLUDES POWER TO MORTGAGE.

It may be said to be moderately well settled that a mere power to sell does not include a power to mortgage.¹

¹ 1 Sugden Vendors (8th Am. ed.), * 396 ; 2 Washburn Real Prop. (4th ed.), 655, pl. 5 ; 3 Redfield Wills (3d ed.), 549.

Thus a mere power in a power of attorney to sell real estate confers no power to mortgage.¹ But the chief difficulty in determining whether a power to sell includes a power to mortgage arises when, as is often the case in wills, the power to sell is coupled with a trust to raise money out of the estate to pay debts or other charges. Where there is a direction to pay debts or charges, nothing being said as to how the money shall be raised, it has been held that this implies not only a power to sell,² but also a power to mortgage, if that method of raising money be more advantageous to the estate than a sale.³ If, however, the will or other instrument expressly authorizes a sale, the question arises whether the power to sell includes, or is to be considered as negating, the power to mortgage. Most of the authorities agree in holding that if it clearly appears from the will or other instrument that the intention of the donor of the power in directing a sale was that his real estate should be absolutely converted into money, or, to use the common expression, that there should be an "out-and-out" sale, then no power to mortgage will be implied.⁴ The rule is very clearly expressed by Mr. SPENCE, as follows: "Generally speaking, a power to sell implies a power to mortgage; but a mortgage is not a proper execution of the trust where the clear, manifest intention of the testator is that the estate should be sold out and out, and that there should be a complete conversion of his real estate, and that the produce of his real and personal estate should be disposed of as money."⁵

In several of the cases which are often cited in support of the broad proposition that a power to sell does not imply a power to mortgage, the intention of the testator that his real estate should be sold "out and out" was clearly

¹ Jones' Mortgages (3d ed.), Sec. 129; Wood v. Goodridge, 6 Cush., 117; Morris v. Watson, 15 Minn., 212.

² Hill Trustees (4th Am. ed.), * 345; 2 Perry Trusts (4th ed.), Sec. 766.

³ Hill Trustees (4th Am. ed.), * 355; 1 Jones' Mortgages (3th ed.), Sec. 129.

⁴ Hill Trustees (4th Am. ed.), * 355.

⁵ 2 Spence Eq. Jur., * 369. See also 1 Lewin Trusts (1st Am. from 8th Eng. ed.), * 425; 2 Perry Trusts (4th ed.), Sec. 768.

manifest upon the face of the will.¹ And it was upon a similar construction of the will that the decision was based in the leading case of *Stronghill v. Anstey*.² On the other hand, where it is apparent that the primary purpose of the testator is not to convert the estate into money, but is to pay the debts or other charges with which it is charged, and this purpose may be equally as well or better accomplished by a mortgage, the power to sell will imply a power to mortgage.³

But suppose that there is a power to sell, coupled with a trust to pay debts or other charges, but there is nothing else upon the face of the will by which to determine whether or not it was the testator's intention that there should be an "out-and-out" sale,—what is the presumption in such case? Upon this question the authorities are not harmonious. Some hold that in the case supposed the power to sell will not be construed as a power to sell out and out; and that such a power, coupled with such a trust, without more, implies a power to mortgage. In other words, that this is the presumed intent of the testator, unless a contrary intent is clearly manifest from other parts of the will. "It seems," says Mr. HILL, "that a trust to sell lands for the payment of debts will authorize a mortgage for that purpose, which is a conditional sale, unless, indeed, it be the clear intention of the testator in directing the sale, that his real estate should be absolutely converted."⁴ This was expressly decided in the leading case of *Ball v. Harris*.⁵ In that case a testator charged his lands with the payment of his debts, and then authorized the trustees to whom the lands were devised to sell them and invest the proceeds in other lands, with further power to sell these also in execution of the trusts specified in the

¹ *Haldenby v. Spofforth*, 1 Beav., 390; *Page v. Cooper*, 16 Id., 396; *Devaynes v. Robinson*, 24 Id., 86.

² 1 De G. M. & G., 635. See the comments on this case in *Hill Trustees* (4th Am. ed.), 536, note 1.

³ 1 *Lewin Trusts* (1st Am. from 8th Eng. ed.), *425; 2 *Perry Trusts* (4th ed.), Sec. 768; 3 *Redfield Wills* (3d ed.), 549. See also *Sugden Vendors* (8th Am. ed.), *396; 4 *Kent Com.*, *147.

⁴ *Hill Trustees* (4th Am. ed.), 355. See also 2 *Spence Eq. Jur.*, *369.

⁵ 4 *Myl. & Cr.*, 264.

will. Beyond this there was nothing upon the face of the will to indicate whether the testator did or did not intend an out-and-out sale. The trustees made an equitable mortgage of the lands devised by a deposit of the title-deeds, and it was contended that they had no power to do so. But the Court held that the primary object of the testator was to raise money to pay debts, and that the power to sell for that purpose did not negative a power to mortgage, if that was the best method of effecting the primary object of the testator. COTTENHAM, L. C., said: "So long ago as the case of *Mills v. Banks*,¹ in 1724, it seems to have been assumed that 'a power to sell implies a power to mortgage, which is a conditional sale,' and no case has been quoted as throwing any doubt upon that proposition. But this is not a mere power to sell; it is a trust to raise money out of the estate to pay debts. It would indeed be most injurious to the owners of estates charged if the trustee could effect the object of his trust only by selling the estate."

The reasoning of this case, it will be observed, applies to all cases where the primary object of the testator is to raise money, whether the purpose of raising the money is to pay debts or is to execute some other trust imposed upon the trustee. And this reasoning accords with the general rule for the construction of powers. "The intention of the donor of the power is the great principle that governs in the construction of powers; and in furtherance of the object in view, the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut down a general power to a particular purpose."² It accords also with the familiar rule in the construction of wills, that a will should be construed in such a way as will most effectually carry out the manifest primary intent of the testator, even if, in order to do so, it may be necessary to reject some particular or special intent.³

¹ 3 Peere Will, 1.

² 4 Kent's Com.,* 345.

³ 1 Redfield Wills (4th ed.), 433; 2 Jarman Wills (Randolph & Talcott's ed.), 53,* 480.

The case of *Ball v. Harris* was cited, and not disproved, in *Stronghill v. Anstey*, *supra*, and has ever since continued to be the law in England.¹ In the case last cited the rule, as above stated, was applied to uphold a mortgage made by one trustee to his co-trustees.

Recent well-considered American cases are to the same effect. In *Loebenthaler v. Raleigh*,² there was a will containing this clause: "If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power to do so, either at public or private sale." The estate included a large tract of land which it was difficult to sell to advantage. It was held that the will conferred a power to mortgage. "It is to be observed," says the Chancellor, RUNYON, "that the testator did not by this provision contemplate a conversion for any other purpose than the payment of debts, nor to any greater extent than might be deemed necessary for that object. His design was to give his executors power to convert his real estate, to the extent that they might deem necessary, for the payment of his debts.

"Mr. FISHER lays it down that a power for trustees to mortgage is sometimes implied in a power to sell, viz.: where to satisfy the terms of the proposed object of the power—as, for instance, to raise a particular charge, subject to which the estate is devised—it is not necessary to make an absolute conversion.³ Where power of sale is given to raise a particular charge only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising money should be preferred to the latter, for the obvious and sufficient reason that it is for the advantage of the estate that it should be

¹ See also *Earl of Oxford v. Earl of Albemarle* (Shadwell, V.C., 1848), 17 Law Journ. H.S.Ch., 396; *In re Dimmock* (Kay, J., 1885), 52 Law Times H.S., 494.

² 36 N. J. Eq., 169.

³ Citing *Fisher on Mortgages*, Sec. 435. The cases of *Stronghill v. Anstey*, 1 De G. M. & G., 635; *Page v. Cooper*, 16 Beav., 396; and *Ball v. Harris*, 4 Myl. & Cr., 264, are authorities on this point.

adopted, and it is within the limits of the power intended to be conferred."

It would be absurd, to say the least of it, to adhere so closely to the literal terms of the grant of power as to necessitate a sacrifice of the property, when by a reasonable construction that result could be avoided. Lord LANGDALE, in *Haldenby v. Spofforth*,¹ in commenting on Lord MACCLESFIELD'S remarks in *Mills v. Banks*,² that "a power to sell implies a power to mortgage, which is a conditional sale," says he conceives this to mean that where it is intended to preserve the estate, there, under a direction of sale, a mortgage will sufficiently answer the purpose. And Lord ST. LEONARDS, in *Stronghill v. Anstey*, *ubi sup.*, says: "It ought, I think, to be considered that in a case where the trustees have a legal estate, and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorize a mortgage, yet where the circumstances justify the raising of the particular charge by a mortgage, it must be, in some manner, in the discretion of the Court whether it will sanction that particular mode or not. It may be the saving of an estate and the most discreet thing that can be done; and as the legal estate would go, and as the purposes of the trust would be satisfied, I think it impossible for the Court to lay down that in every case of a trust for sale to raise particular sums, a mortgage might not, under the circumstances, be justified." The rule is truly expressed by Mr. HILL as follows: "A power for trustees to sell will authorize a mortgage by them, which is a conditional sale, whenever the objects of the trust will be answered by a mortgage; as, for instance, where the trust is to pay debts or raise portions. But where the trusts declared of the purchase money show that the settlor contemplated an absolute conversion of the estate, a mortgage will be an improper execution of the power."³ This case must be considered as emphatically overruling anything to the contrary in the previous case of *Ferry v. Laible*,⁴ which is

¹ 1 Beav., 390.

² 3 Peere Will., 1.

³ Citing *Hill Trustees*, 475.

⁴ 31 N. J. Eq., 566.

not even cited, and is apparently utterly ignored, in the opinion of the Chancellor.

The case of *Loebenthaler v. Raleigh*, *supra*, was approved by the Supreme Court of Massachusetts in the recent case of *Kent v. Morrison*.¹ In the case last cited real estate was devised to the wife, "with full power to sell and convey the same by deed (part or all of it); the proceeds thereof are to be used for her comfort and otherwise as she may think proper." Notwithstanding the specific direction that the power should be executed by *deed*, the Court held that the power included a power to mortgage, and that it might be executed by a guardian for the wife, she having become insane, under a license from the Probate Court. The Court distinguishes the prior case of *Hoyt v. Jacques*,² as belonging to that class of cases where the intention of the donor of the power is that the real estate shall be converted out and out into money. The case of *Loebenthaler v. Raleigh*, *supra*, was also followed in the well-considered case of *Waterman v. Baldwin*,³ which must be regarded as overruling anything to the contrary in the previous case of *Hubbard v. German Catholic Cong.*⁴ To the same effect is the recent and well-reasoned case of *Faulk v. Dashiell*.⁵ Other authorities, particularly those in Pennsylvania, go much further, and hold that a power to sell, even though not coupled with a trust to pay debts or raise charges, implies a power, unless it is clearly negatived, to mortgage: *Zane v. Kennedy*; ⁶ *Steifel v. Clark*.⁷ The case of *Steifel v. Clark* distinguishes and controls the prior case of *Head v. Temple*,⁸ in Tennessee.

But there are also authorities of great weight, holding that a power to mortgage cannot be implied from a power to sell, though coupled with a trust to pay debts or other charges out of the proceeds; that a power to raise money by a sale negatives a power to raise money by a mortgage, and *prima facie* is to be construed as a power to sell "out

¹ 26 N. E. Rep., 427.

² 129 Mass., 286.

³ 68 Iowa, 255.

⁴ 34 Iowa, 31.

⁵ 62 Texas, 642.

⁶ 73 Pa. St., 182.

⁷ 9 Baxter (Tenn.), 466.

⁸ 4 Heisk. (Tenn.), 34.

and out." The leading case in support of this doctrine is *Bloomer v. Waldron*,¹ and represents the opposite extreme from the Pennsylvania cases. The opinion of COWEN, J., is based upon a very narrow and rigid common law construction of powers, and discloses a marked hostility to the more liberal rules of equity. The authority chiefly relied on in support of the opinion is *Holdenby v. Spofforth*,² before cited, in which, as already stated, the intent of the testator that there should be an "out-an-dout" sale was clearly manifest. COWEN, J., even intimates a strong doubt as to the rule, now perfectly well settled, that a general power to raise money out of rents and profits implies a power to sell or mortgage. And finally, in respect to curing a defective mortgage by a subsequent exercise of the power of sale, the opinion is materially modified, if not overruled, by the later case of *Mutual Life Ins. Co. v. Woods*.³

In *Hoyt v. Jaques*,⁴ it was held "that under a will a trust with a power to sell *prima facie* imports a power to sell 'out and out,' and will not authorize a mortgage unless there is something in the will to show that a mortgage was within the intention of the testator." But this statement is qualified by what follows: "It has been held that where the sole object and purpose of the testator, in conferring the power, was to pay debts or a particular specific charge upon the estate, and the estate itself is devised subject to that charge, such power to sell may authorize a mortgage; but, where it appears from the will that the intention of the testator was to sell the estate and convert it absolutely, a mortgage by the donee of the power to sell is void."⁵ If the case of *Hoyt v. Jaques* can be construed as deciding anything more than that a power to sell does not include a power to mortgage, when the manifest intent of the donor is that the real estate shall be sold out and out and con-

¹ 3 Hill (N. Y.), 361. ² 1 Beav., 390.

³ 121 N. Y., 302; see also *U. S. Trust Co. v. Roche*, 116 N. Y., 120.

⁴ 129 Mass., 286.

⁵ Citing, amongst other authorities, *Ball v. Harris*, 4 Myl. & Cr., 264.

verted into money, it must be deemed to be limited by the subsequent case of *Kent v. Morrison*, above cited.¹

Some of the cases which are cited in the text-books as in accord with those last referred to are not so in fact. Thus in *Green v. Claiborne*,² it was expressly provided in the deed of settlement that there should be a sale of the trust property *and a reinvestment of the proceeds in other property upon the same trusts*, which the Court held to indicate that the grantor intended an absolute sale. Even upon this theory, however, the decision cannot well be reconciled with that in *Ball v. Harris*, *supra*.

In *Butler v. Gazzam*,³ the conveyance to the trustee, besides authorizing a sale and reinvestment of the proceeds, expressly provided that the land should *be kept free from incumbrance*.⁴

Of *Ferry v. Laible*, *supra*, which is cited in the previous note, it is to be observed that it was a decision of the Vice-Chancellor, and that it is virtually overruled by the decision of the Chancellor in the later case of *Loebenthaler v. Raleigh*, above referred to. The cases of *Hubbard v. German Catholic Cong.*, and *Temple v. Head*, must also be deemed to be qualified and limited by the later cases in the same courts, of *Waterman v. Baldwin*, and *Steifle v. Clark*, *supra*.

The authorities which hold that a power to sell, though coupled with a trust to pay debts or charges, *prima facie* implies an "out-and-out" sale and negatives a power to mortgage, seem not to attach sufficient importance to the distinction between a discretionary power to

¹ The following, though not going to the full extent of the two cases, last cited, may be regarded as more nearly in harmony with them than they are with the case of *Ball v. Harris*, *supra*, and the cases in accord with it: *Tyson v. Latrobe*, 42 *Maryl.*, 325 . . . (in this case *BARTOL*, Ch. J., dissented in an elaborate opinion); *Wilson v. Maryland Life Ins. Co.*, 60 *Id.*, 150; *Price v. Courtney*, 87 *Mo.*, 387; *Stokes v. Payne*, 58 *Miss.*, 614. See also 1 *Lewin Trusts* (1st Am. from 8th Eng. ed.), * 425.

² 83 *Va.*, 386.

³ 81 *Ala.*, 491.

⁴ The following cases are also cited in some of the text-books in support of the proposition that a power to sell *prima facie* implies an "out-and-out" sale and negatives a power to mortgage: *Ferry v. Laible*, 31 *N. J. Eq.*, 566; *Hubbard v. German Catholic Cong.*, 34 *Iowa*, 31; *Temple v. Head*, 4 *Heisk. (Tenn.)*, 34.

sell and an imperative direction to sell. That there is a clear distinction is well settled.¹

Each may be coupled with a trust to pay debts or charges, but a discretionary power to sell is not, merely by coupling it with such a trust, thereby converted into an imperative direction to sell "out and out," especially when it is manifest that the primary object of the grantor of the power is not to convert the land into money, but is to pay debts or other charges, and such object may be accomplished with better advantage to the estate by a mortgage. In such case, particularly if the power is given by a will, such a construction should be adopted as will most effectually carry out the primary object of the testator; and if, under the circumstances of the particular case, this can be done with more advantage to the estate by a mortgage than by a sale, then the power to sell should be construed as discretionary and not as imperative.

That a power to sell, though coupled with a trust to pay debts or other charges, does not *prima facie* imply a power to sell "out and out" is shown by the recent decision of the Supreme Court of the United States in *Phelps v. Harris*,² where it was held that a power to "sell and dispose of" property implied a power to make *partition* of it between the beneficiaries, even though there was a further direction to "invest the proceeds."³

Supreme Court of Pennsylvania.

ROBB v. CARNEGIE BROS. & CO., LIMITED.

Sic utere tuo ut alienum non laedas—When equity will restrain defendant in the use of his own land—when plaintiff's only remedy is at law—Private industry not entitled to the immunities of a public servant—Measure of damages—Natural use of land.

¹ 2 Perry Trusts (4th ed.), Sec. 507.

² 101 U. S., 370.

³ To the same effect is the recent English case of *Frith v. Osborne*, L. R. 3 Ch. Div., 618; S. C. 18, Eng. Rep., 724.

Where a defendant on his own land engages in an industry which causes physical injury to the adjoining land of the plaintiff, the defendant must respond in damages if the industry has no natural connection with the soil or the subjacent strata.

Therefore, where the defendant's coke-oven emitted fumes which impaired the plaintiff's crops, it was held to be no defence to an action at law to aver that the site for the oven was selected with care, and that no land was better adapted for coke-burning than the land in question.

It seems that on such a state of facts equity would refuse to interfere by an injunction, since such interference would amount to a suppression of the coke industry.

But while equity will recognize the importance of such an industry by refusing to suppress it, the law, in spite of the importance of the industry, will treat it as a private enterprise, and will deny to it those immunities which belong of right only to railroads and other public servants.

The measure of damages in such case is not the same as in condemnation proceedings, but is solely the actual harm which has resulted to the plaintiff from the operation of the defendant's industry.

Appeal of Carnegie Brothers & Co., Limited, defendants, from the judgment of the Common Pleas of Westmoreland County in an action on the case brought by Adam Robb to recover damages for injuries alleged to have been sustained in respect of his property by reason of the operation of defendants' coke-ovens, from which ovens offensive fumes, smoke and dirt were poured upon his premises.

It appeared upon the trial that the plaintiff was the owner of a farm adjoining the tract upon which the defendants' ovens were situated. He had acquired the greater part of the farm prior to the defendants' purchase of their tract, and had secured the residue more recently. The plaintiff's witnesses testified that the soil on his farm was limestone, part black loam, and all good. The defendants' witnesses declared that it was "second-rate" soil and far below the average of that found in Westmorland County's agricultural districts. The defendants' tract consisted of about twenty acres of low ground, swampy, unfit for cultivation, and overgrown with underbrush, willows and sycamores. This piece of ground lay three hundred feet below the plaintiff's land and nine hundred feet below the brow of the hill where the plaintiff's arable land began. It was a secluded place, but well adapted for coke-burning by rea-

son of its proximity to certain coal mines with which there was convenient railroad communication. On this tract the defendants erected coke-ovens and machinery of the most improved kind to the value of \$200,000. The plaintiff made no objection to the building of the ovens, but actually assisted in the work.

The plaintiff called witnesses who proved a gradual diminution of crops for six years prior to the bringing of suit. There was also testimony to the effect that the plaintiff had lost timber and fruit trees, and that crops had grown to a certain height and, in spite of fertilizers and manure, had then died. Evidence was offered on behalf of the plaintiff that damage to the extent of \$10,000 had, in witness's opinion, been done to plaintiff's property by the erection of the ovens and by the smoke. The admission of this testimony was made the subject of the second assignment of error. Witness was also asked what, in his opinion, was the market-value of the plaintiff's property as affected by defendants' ovens. An objection to the question was overruled, and the witness was permitted to answer. Third assignment of error. Witness was further permitted to testify that, in his opinion, plaintiff's farm could (but for the ovens) be utilized for fruit growing. Objected to as irrelevant, both because it had no relation to *actual* damage and because, in point of fact, an orchard was planted on the farm, and the fruit-bearing qualities of the trees were in evidence. Objection overruled. Ninth assignment of error.

The only other assignments commented upon by the Court (the seventh and the twelfth) are sufficiently set forth in the opinion.

Verdict for plaintiff for \$4,798.10. A motion or a new trial was refused, and defendants took this appeal.

Paul H. Gaither, Esq., and *John F. Wentling, Esq.*, (*J. A. Marchand, Esq.*, and *D. A. Miller, Esq.*, with them), for appellants.

George Shiras, Jr., Esq., *W. F. McCook, Esq.*, *P. C. Knox, Esq.*, and *James H. Reed, Esq.*, representing various coke companies, filed an intervening argument on behalf of appellants.

James M. Peoples, Esq., (D. S. Atkinson, Esq., with him), for appellees.

OPINION OF THE COURT.

Opinion of WILLIAMS, J. October 5, 1891.

This case was tried with considerable care in the Court below, and was in most respects well tried. Some questions were, however, raised and considered on the trial which were not necessarily involved, and which hindered, rather than helped, the Court and jury in reaching a correct result. For this reason, and because the case as it is presented is one of considerable general importance, it seems desirable that the position of the parties, and principles by which their relative rights are to be adjusted, should be briefly considered. This may be done by answering the following questions: First, has the plaintiff shown a cause of action for which he can recover in a court of law? Second, if he has, what is the measure of his damages? Third, was the evidence which was admitted under objection relevant to the issue before the jury?

The plaintiff shows that, prior to 1871, he was the owner of a farm in Westmoreland County, on the uplands north of Brush Creek. His cultivated fields began about 1,000 feet from and about 300 feet above the stream, and extended back to and beyond his dwelling and farm buildings, which were about one-half mile from the stream. He shows that, in 1871, the defendants bought a tract of land in the valley, and extending up the slope some 300 or 400 feet, on which they erected coke-ovens on the flat on the north side of the creek. He alleges that the smoke and gas from these ovens pass over his farm, injuring thereby his crops; diminishing the productiveness of the soil and the desirability of his house as a place of residence. Evidence was given on the trial in support of this allegation. The defendants deny that the plaintiff has suffered injury in his crops, his soil or the comfort of his home, and they further deny that the injuries alleged, if actually sustained, would entitle the plaintiff to recover, and for this they give the following reasons: (a) such injuries are the natural and

necessary result of the development by the owner of the resources of his own land, as in *Sanderson v. the Coal Company*; ¹ (b) they result from a reasonable use of his own land for a lawful purpose, as in *Huckenstein's Appeal*; ² (c) they result from the pursuit of a lawful calling in a lawful manner, without either negligence or malice on the part of the owner or his employees, as in *Lippincott v. the Railroad Company*.³ In *Sanderson's* case the land of the Coal Company was coal land, its value could be realized by the owners in no other way than in bringing the coal to the surface so that it could be prepared for the market. In the process of mining, subterranean veins of water are necessarily opened, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into surface streams and pollutes them. If this could not be done a great industry would be interfered with, and the owner of the coal land denied the rights of ownership of his land for the benefit of a neighboring owner whose title was no greater or higher than his own.

The maxim, "*Sic utere tuo ut alienum non lædas*," was, therefore, neither suspended nor modified in *Sanderson's* case.

The Coal Company was using its own land in the only manner practicable to it. The harm done thereby to others was the least in amount consistent with the natural and lawful use of its own. If this use was to be denied to the Coal Company because some injury or inconvenience to others was unavoidable, then the result would be practical confiscation of the coal lands for the benefit of householders living on lower ground. But the defendants are not developing the minerals in their land or cultivating its surface. They have erected coke-ovens upon it and are engaged in the manufacture of coke. Their selection of this site rather than some other is due to its location and to their convenience, and has no relation to the character of the soil or to the presence or absence of underlying minerals. The selection was, no doubt, a wise one, quite se-

¹ 113 Pa., 126.

² 70 Pa., 102.

³ 116 Pa., 472.

cluded and quite convenient to the several mines from which the materials were to be obtained for the making of coke, but it was the selection of a manufacturing site, and is subject to the same considerations as if glass or lumber or iron had been the commodity to be produced instead of coke. The rule in Sanderson's case has, therefore, no application to the facts of this case. The injury, if any, resulting from the manufacture of coke at this site is in no sense the natural and necessary consequence of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata. The rule in Huckenstein's Appeal is equally inapplicable. The land of the appellant in that case had upon it a deposit of fine brick clay which could be made into bricks with profit, if this was done near the pit from which the clay was taken. This is the usual, and probably a necessary, way of converting the clay into brick. An effort was made to enjoin against the burning of the brick by Huckenstein on the field where the clay was obtained. The injunction was refused, and it was held that upon the case as presented Huckenstein was making a reasonable use of his own land which equity would not interfere with. Whether he would have been liable in an action at law for any substantial injury he might do to a neighbor by the burning of bricks, was not before the Court, and was not considered. We think it is true, as held by the Judge of the Court below, that the evidence in this case would not justify an injunction. It shows a selection of a site as well adapted to the business and as remote from dwellings as any in that region. To enjoin the manufacture of coke at such a site would amount to a prohibition of its manufacture, and the destruction of vast allied and dependent industries of immense value to the public, as well as to those directly engaged in them. An injunction is not of right, but of grace, and will never be issued by a court of equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress

at law. No more than this is fairly covered by Hucken-stein's case. The plaintiff in this case is, therefore, in the right court, and if he is substantially hurt by the use to which the defendants have seen fit to devote their land, we see no reason why he may not recover, unless it is found in the last of the positions taken by the defendants, for which Lippincott's case is cited.

It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual, so that, when these interests are in conflict, the latter must give way. If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation ; but if he is affected only in his tastes, his personal comfort, or pleasure, or preferences, these he must surrender for the comfort and preferences of the many. Thus highways are necessary to the public business and comfort. Some noise and dust are necessarily occasioned by the legitimate use of them. This may be disagreeable ; perhaps, in some cases, positively harmful to some one or more of the persons living along them ; but for this there is no remedy at law or in equity. It is one of the necessary consequences of subjecting the individual to the public in those things as to which their interests are in conflict. Railroads have become the great highways of travel and commerce. The turnpike and canal have been superseded, and the people and their products are transported at a great advance in speed and comfort over the modern highway by the power of steam. The law recognizes the public character of these highways. Their presence is necessary to the prosperity and comfort of the public. To some persons who live near them, as to some persons who live upon a busy city street, the incessant roar of business and the dust of passing vehicles or trains may be unpleasant or painful, but whether such persons live upon a country road, a paved street, or a railroad, they are alike remediless. No action will lie against the municipality, the turnpike or the railroad company for the noise and dust caused by the legitimate use or operation of the highway in either case. For negligence or malice, the

wrongdoer is liable to the party injured ; but for the lawful use of the road in the customary manner, no liability attaches to the traveller or owner. The railroads are built, as is the turnpike or the street, under laws regulating their construction and use, in the interest of the public which is to be served by them. The right to operate railroads is a necessary incident to the right to build them, and this was held in Lippincott's case. But the production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise, conducted for private profit and under the absolute control of the producer. He may increase his business at will or diminish it. He may transfer it to another person or place or State, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions and refuse to sell to any person at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own acts. The interests in conflict in this case are therefore not those of the public and of an individual, but of those of two private owners, who stand on equal ground as engaged in their own private business. Lippincott's case is, therefore, no reply to the plaintiff's case.

What, then, is the measure of damages? The declaration charges an injury to the trees and crops growing on the surface, and a permanent injury to the soil by the deposit upon it from the passing smoke and gas of sterilizing and poisonous substances. To the first of these the statute of limitations was properly applied. During two of the six years open to inquiry the farm was in possession of a tenant who paid what is admitted to have been a full rent for it. The crops for those two years should, therefore, be excluded from consideration. As to the remaining four years, if the crops were so affected as to reduce their quantity or value, the shrinkage upon each year's crops should be shown in bushels or tons, or approximated as

nearly as possible. For the acreage in wheat or corn in any one of these four years, for example, being shown, and the yield per acre, a comparison of the crop with that raised on the same before the ovens were built, could be made, and, so far as the difference was shown to be due to the smoke or gas, it would afford some basis for an estimate of the damage sustained on that year's crop. In this manner the actual injury to the crops, if any, could be gotten at pretty nearly. As to a permanent injury to the soil by the deposit of injurious particles upon it, a chemical analysis will afford the only safe guide. Differences in the amount of the crop might be due to the effect of the smoke on the growing plant, to negligent tillage, to exhaustion of the soil by long cropping, or from many other causes; but if, as some of the witnesses have testified, a crust of foreign and sterilizing substances has been deposited over this farm, varying from a quarter to a third of an inch in thickness, specimens of it can and should be produced, and its composition, and the effect of its presence, ascertained and explained to the jury by those competent to speak on the subject. This is a question susceptible of a clear and satisfactory solution by the application of scientific tests, which the Court and jury should have the benefit of. If the result is to show a permanent injury to the soil, which impairs its productiveness to an appreciable degree, the extent of the loss in the value of the farm can be readily computed. If such permanent impairment is not made to appear, this part of the plaintiff's claim should be rejected altogether. The fact that the plaintiff may regard his farm as less desirable than before, because of the proximity of an undesirable business, or an undesirable neighbor, or the further fact that its selling value has been reduced by reason of such proximity, affords no ground for a recovery. The location of a livery stable, a restaurant, a distillery, and many other kinds of business, close to one's home, might diminish its comfort and its market value, but the owner would be without legal redress so far as the effect of proximity is concerned.

If, however, the business was so conducted as to affect

the use of adjoining property or the health of its occupants, these tangible and substantial injuries, capable of measurement by a pecuniary standard, might sustain an action for damages. The ordinary rule for the ascertainment of damages where land has been entered and appropriated under the right of eminent domain, does not furnish a measure of the plaintiff's right to recover in this case, for the reason already given. Where an entry and seizure has been made, the effect of the seizure and appropriation of the part of the land of the owner to a particular use is to be considered, as well as to the value of what is taken. This can be best adjusted by ascertaining the selling value of the whole property before the entry, and after it has been made. The difference, if any, shows the actual loss which the owner has suffered. But in this case there has been no entry upon, or appropriation of, the plaintiff's land. What he alleges is that the prosecution of the business of making coke by the defendants on their own land has hurt his crops and injured his soil. They have the right to make coke. If the establishment of that business near the plaintiff affects the selling value of his farm, he can no more recover for that than he could recover against the saloon-keeper or the liveryman, because the location of their business near him had made his property unsalable. The nature of the business is therefore to be left out of the view. The sole question is, What harm has been done the plaintiff by, or as the direct result of, the prosecution of the defendants' business at a place where they had a legal right to carry it on? The plaintiff might honestly think, and his neighbors might be willing to testify, that the mere location of the ovens on adjoining land reduced the value of his farm thirty or fifty per cent., or more, and a comparison by them of the value before and after the building of these ovens would include this element, for which there can be no recovery. What has been now said substantially disposes of our question relating to the testimony objected to. The second assignment of error is sustained. The question objected to should have been excluded because it called for no fact, but for a lumping estimate, which opened the way

for the witness to introduce considerations that we have seen had no place in the adjustment of the damages.

The question referred to in the third assignment should have been excluded, for reasons already given. The seventh assignment is also sustained. It was of no sort of consequence where the defendants obtained the material which they used in making coke, or what price they paid for it, or what the miners who brought it to the surface were paid for mining it, and such questions should have been excluded. The ninth assignment must also be sustained. The question was not what purposes the plaintiff might have devoted his farm to, and what damages he would have sustained in that case, but to what purposes had he devoted it, and to what extent had he been interfered with by the defendants' business.

An examination of the evidence shows that the plaintiff purchased his farm, containing eighty-two acres, for \$4,000, a few years before the ovens were built. Several years after they were built he bought twenty acres adjoining, which contained coal, which he mined and sold to the employees of the defendants. So far as the evidence indicates, the latter piece was not farmed, but kept and used for mining coal.

For the injury to four years' crops, and for permanent injury to his soil, the plaintiff recovered nearly \$1,000 more than his farm cost him, and still finds it to his advantage to reside upon it and to cultivate it. The fact that such a verdict was rendered shows that the Court and jury must have been misled, to some extent, by the irrelevant testimony and by the improper measure of damages which the jury was left to apply.

It only remains to consider briefly the twelfth assignment of error. The learned Judge said to the jury: "After much thought, we have arrived at this conclusion: First, that the owners of coal land may develop and operate the same, even to the injury of adjoining land-owners, without remedy on the part of the latter, unless malice or negligence be shown; second, that a court of equity will not restrain the operation of works of an injurious nature where

the best possible place to do the least injury to others has been selected ; third, that while equity will not restrain, law will give a remedy where actual, positive, serious injury has been done to another by bringing upon adjacent lands, and manufacturing, material not part of the land, whether such harm be done to health or property." We cannot see that the appellants were hurt by this instruction. The first proposition is no more than a statement of the rule which was held in Sanderson's case. The second is all that the appellants could ask, and, as a general rule, is well settled. If there is any error in the third, it is in the concession that the mine-owner is under less obligation to his neighbors when he makes coke upon the tract from which the coal is mined than when he makes it elsewhere. If this concession was mistaken, as perhaps it was, it did not lay any burden on the appellants, and they have no right to complain of it. Whether one who mines coal, or petroleum, or lead, on his own land has, by virtue of that fact alone, a right to manufacture or refine such product on the tract from which it was obtained under circumstances which would prevent its manufacture or render him liable for damages if he manufactured on some other tract, is a question not raised by the facts of this case. If the relation of the miner to his product, or the surface to the underlying materials, could confer exemption from liability for the consequences of the manufacture of the material, mined where the process was conducted on the same tract, the defendants were not within range of such exemption. They did not mine the coal they used. It was not mined upon the land upon which the coke-ovens stood. They were, therefore, under the general rule, and not within the exemption, if such exemption really exists. At the same time the location of these parties and the industries of the region are not to be lost sight of. The plaintiff's farm is in a region in which bituminous coal is obtained in large quantities. He himself mines coal upon his own land for sale. The conversion of coal into coke, to supply fuel for the great iron and steel mills of Western Pennsylvania, is one of the greatest industries

of the region. Many millions of money are invested in it, and many thousands of men are employed about its production. It has been largely instrumental in the development, growth and general prosperity of the region. The plaintiff shares the general benefits, and seems to possess some advantages that are special and grow directly out of the establishment of these works near him, for he has been thereby provided with customers for his coal and his farm-products at his own door.

These considerations should be borne in mind in adjusting the damages, if any have been sustained, so that the plaintiff, while he recovers for his actual loss in the products of his farm, or the destruction of his soil, as the evidence may show the facts to be, shall not be allowed exemplary damages, and so that the defendants shall not be treated as wrongdoers in the establishment of their plant on a well-selected and secluded tract of land belonging to themselves.

As this case goes back for a new trial, it is quite proper for us to add that the trial judge is, in an important sense, the thirteenth juror, and when the amount of the verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages, or a mistake in computation, he should not hesitate to set it aside.

The judgment is reversed, and a *venire facias de novo* is awarded.

The principal case is a valuable addition to the long line of decisions which explain and qualify the oft-quoted maxim: *Sic utere tuo ut alienum non lædas*. To what extent is one to be restricted in the use of his own land by the prohibition "Thou shalt do no hurt to thy neighbor"—a prohibition which lies at the very foundation of the law of Torts? Pollock on Torts,* 12. This is the question which the courts are constantly called upon to answer, especially in cases which, like the principal

case, involve large commercial interests and great sums of invested capital. Indeed, the pecuniary or commercial importance to one litigant of a decision favorable to himself often so clearly outweighs the disadvantage and discomfort which would in that event be caused to his adversary, that the courts are always tempted to give controlling weight to what may be called the "argument of expediency," and in some instances they have yielded to the temptation. But in general the courts have looked beneath the

surface of the question before them and beyond the facts in a particular case, and have recognized that the point for decision is not, in a given case, whether a great industry shall be sacrificed to a neighbor's whim, but whether or not the act of which the plaintiff complains is a violation of the sacred property-rights of a fellow-citizen. Accordingly, our readers cannot fail to read with especial satisfaction that portion of the opinion of Mr. Justice WILLIAMS, in which, after admitting that in proper cases the individual must yield his interest to the public good, he uses the following significant language: "But the production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing, or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the result of private enterprise, conducted for private profit and under the absolute control of the producer. He may increase his business at will or diminish it. He may transfer it to another person or place or State, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions and refuse to sell to any person or at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own acts. *The interests in conflict in this case are, therefore, not those of the public and of an individual, but those of two private owners, who stand on equal ground as engaged in their own private business.*"

This portion of the decision is valuable from the fact that it does

away with extraneous matters which might influence the judgment, and makes it possible to examine the point of law which the case really decides. That point, as stated above in the syllabus, is that where the defendants' coke-oven emits fumes which impair the plaintiff's crops, it is no defence to an action at law to aver that the site for the oven was elected with care, and that no land was better adapted for coke-burning than the land in question.

The reason for this decision is well expressed in the judgment of the Exchequer Chamber in *Fletcher v. Rylands* (L. R. 1 Ex., p. 278). In the course of his opinion, which was in terms adopted by the House of Lords, BLACKBURN, J., said: "The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damuified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural or anticipated conse-

quences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.

Although some emphasis is here laid by the learned judge upon the bringing of the injurious agency upon defendants' land, it is clear that the liability of the defendant is not understood to depend upon such a state of facts. Indeed, in *Fletcher v. Rylands* the defendant did not bring the water upon his own land; it flowed there naturally, and all he did was to utilize it by the construction of a reservoir. See the report of the case in 3 Hurlstone & Coltman, 786. Accordingly, effect must be given to the language of Lord CRANWORTH in the House of Lords: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbors, he does it at his peril." The reason for the decision, then, rested upon the fact that the defendant had accumulated water for the purposes of a reservoir, which, as Lord CAIRNS pointed out, was "a non-natural use" of the land. *Fletcher v. Rylands* and the principal case are, therefore, both authorities for the proposition that a defendant will be liable for damage caused by the escape of a substance (water in the one case, and coke fumes in the other), provided the substance is not liberated in the course of a natural user of his land by the defendant. The question whether or not the elements of a nuisance were present in one case and not in the other, does not concern us now. The question at once arises, What is a natural user of land? In addition to deciding that coke-burning is not a natural use, the Court, in the principal case, in referring to

its own earlier decision in *Penna. Coal Co. v. Sanderson*, 113 P. S., 126, incidentally decided what *does*, in its judgment, constitute such a use. "In *Sanderson's case*," says WILLIAMS, J., "the land of the Coal Company was coal land. Its value could be realized by the owners in no other way than by bringing the coal to the surface, so that it could be prepared for the market." Again, in referring to the case before him, the learned Judge remarked: "But the defendants are not developing the minerals in their land or cultivating its surface." And again: "The injury, if any, resulting from the manufacture of coke at this site, is in no sense the natural and necessary consequence of the exercise of the legal rights of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata." It seems, therefore, that a use of land to be a natural use must have a necessary connection with the soil or the subjacent strata. This statement is substantially in harmony with the language of Lord CAIRNS in *Rylands v. Fletcher* (L. R. 3 E. & I. App. Cases, p. 339). Now, the purpose of determining in a given case whether a use of land is natural or not is, generally speaking, to ascertain to what extent the end which the defendant has in view justifies the means; or, rather, to ascertain whether or not the defendant is liable for the results of the means which he employs. Thus, in *Rylands v. Fletcher* (*supra*), and in the principal case, as soon as it appeared that the use was non-natural, the Court found

no difficulty in holding the defendant liable for damage actually done, although the damage followed inevitably from the use.

Is the converse of this rule sound law? Does the fact that a use is natural justify acts which cause damage merely because the acts are essential to the use? An examination of the cases seems to show that there is a conflict of authority on this point. Generally, it may be said, the converse of the rule does not hold good. The weight of authority is to the effect that acts done in the natural use of land which cause damage to the property of a neighbor are protected only when the damage results from the operation of purely natural forces upon the injurious substance. Or, to say the same thing in other words, a plaintiff cannot complain of the injuries which result when natural forces, acting upon the injurious substance, cause it to leave the position which it occupied when found by the defendant and cause it to come in contact with the plaintiff's property. In short, the immunity of the defendant depends upon the presence of two elements: (1) the use of his land must be natural; (2) the agency which transports the injurious substance from its original position to the plaintiff's property must also be natural. The question has usually arisen in reference to the mining of coal; and the earliest case on the subject, *Smith v. Kenrick* (7 M. G. & S., 515; 62 E. C. L., 1849), involved the rights of owners of adjoining collieries.

In that case the defendant's colliery adjoined the plaintiff's, but was situated upon a higher level. One consequence of this fact was that a large body of subterranean

water was prevented from flowing into the plaintiff's workings only by a large horizontal bar of coal, all of which bar was part of defendant's colliery. A corresponding barrier upon the plaintiff's land had previously been removed by a trespasser, so that the defendant's barrier was the plaintiff's only protection. The defendant, although he knew what the result would be, proceeded to remove this bar for the purpose of obtaining coal, and so working his mine in the manner most advantageous to himself. As soon as the bar was removed the water flowed into the plaintiff's mine, and he forthwith brought his suit. But the Court held that if the plaintiff's barrier had not been removed he would have been as amply protected as if the defendant had not removed his, and that the defendant, as he might then have mined up to the very boundary line, could not now be restricted in consequence of an act for which he was not responsible. He was therefore discharged from liability; and this decision was said to be in harmony with the civil law by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it (*Dig. Lib.* 39, tit. 3). That the decision is a direct authority for the statement of the law as made above appears from the language of *CRESSWELL, J.*, in contrasting the facts before him with those in *Haward v. Bankes* (2 Burr, 1113). Says the learned Judge (p. 563): "There can be no doubt that a man may cause water to flow from his own premises into his neighbor's so as to make himself liable to an action. . . . In this case it ought not to be said that

he *caused*, but that he *permitted*, the water to flow into the plaintiff's mine."

In *Baird v. Williamson* (15 C. B. [N. S.] 376; 108 E. C. L., 1864), the defendant and plaintiff were owners of adjoining mines, the mine of the former being, as in *Smith v. Kenrick*, on a higher level. Water came into the plaintiff's mine from two sources, and for one the defendant was held liable, and for the other he was not. This is therefore a peculiarly instructive case. Part of the water flowed from openings made by the defendant on his own premises for the purposes of obtaining the mineral, and as to this the Court said (p. 390): "The owners of the higher mine have a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water which flows by gravitation into an adjoining mine from works so constructed." Part of the water came from a source lower than the plaintiff's mine, but was raised by pumps to a higher level, so as to enable the defendant to reach other mineral lying at a greater depth. Referring to this the Court says (p. 391): "In respect of this water we think the action lies. The defendants, as occupiers of the higher mine, have no right to be active agents in sending water into the lower mine. . . . If, while the occupier of a higher mine exercises that right [*i. e.*, the right to mine minerals in the usual way], nature causes water to flow to a lower mine, he is not responsible for this operation of nature."

Crompton v. Lea (L. R. 19 Eq., 115, 1874) was a case in which the plaintiff's bill alleged that the defendants, in operating the mine,

proposed so to excavate as to admit the waters of the river Douglas, which would inevitably flow through the workings of the defendants into the plaintiff's mine. The bill further alleged that the proposed excavation was not for any legitimate mining purpose, and as this allegation was confessed by the defendants' demurrer, the demurrer was overruled. This case is therefore an authority for the statement as above made, that both the elements of immunity must be present; not only must the influx of water be produced by natural forces, but it must be in the course of a user which is legitimate and natural. In *Smith v. Fletcher* (L. R. 9 Ex. 64, 1874) a defendant in working his mine made cuts to carry surface water, which but for the cuts could never have reached the plaintiff's mine. In consequence of exceptionally heavy rains, the water, under the operation of the law of gravitation, found its way into the plaintiff's mine, and the Court (reversing the trial judge) held that it was a question for the jury whether the mode of working the mine was reasonable and proper.

In *Wilson v. Waddell* (L. R. 2 App. 95, 1876) it was distinctly stated in the House of Lords by Lord BLACKBURN that the question before the Court in *Smith v. Fletcher* and *Compton v. Lea* was not involved in the case under consideration. So no difficulty was felt in deciding that the defendant was discharged from liability where mineral workings had caused a subsidence of the soil and a consequent shedding of rainfall into the plaintiff's lower coal field.

In *West Cumberland Iron and Steel Co. v. Kenyon* (L. R. 11 Ch. Div., 1879) there was a substantial

recognition of these principles. The case itself was a curious one, because, although it was admitted that the defendant's operation was not in the due course of mining, it was yet contended on his behalf that no more water had, as a consequence of his act, found its way into plaintiff's mine than would have flowed there if his act had not been done at all.

The Court was of opinion upon the evidence that such was the fact, and JAMES, L. J., in stating the limitation on the defendant's right to deal with water in his mine, used the following language (p. 786): "When he ceases dealing with it on his own land, . . . he is not to allow or cause that water to go upon his neighbor's land in some other way than the way in which it had been affected before."

The principles which underlie these cases are not, to the writer's knowledge, questioned in any jurisdiction excepting *Pennsylvania*. In that State the Supreme Court has gone the full length of declaring that wherever the defendant makes a natural use of his land he is not liable for damages which inevitably result from that use. This, it will be observed, is the converse of the rule recognized in *Rylands v. Fletcher* and in the principal case. Accordingly the elements of a defendant's immunity in *Pennsylvania* must be said to be (1) that the use of the land shall be natural; (2) that the act causing damage to the plaintiff should be necessary to the use. It is not sufficient to show that the injurious act is one which is advantageous to the defendant, or that it will facilitate his operations: it must be necessary and unavoidable.

This doctrine was first announced

in the well-known case of the *Penna. Coal Co. v. Sanderson* (113 P. S., 126, 1886). This case had come before the Court three times before, and on each occasion the decision was favorable to the plaintiff. Finally, however, the earlier decisions were overruled, and the Court, by a majority of four judges to three, established the doctrine as above outlined.

In that case the plaintiff depended for a portion of his water supply on a stream which had its source in a swampy region at the bottom of the slope on which the defendant coal company subsequently sank its shaft. In mining for coal, large quantities of mine water were encountered, and it became necessary to remove the water or to stop the work. As the water would not flow away under the operation of natural forces, it became necessary to use artificial means of getting rid of it. Accordingly pumps were called into requisition, and the water was thus raised to the mouth of the shaft. There all interference with it ceased. It was allowed to take its course, and, flowing naturally down the slope, it contaminated the sources of the plaintiff's stream, which thus became unfit for use. The Court upon these facts decided that the plaintiff's *damnum* must be considered as *absque injuria*. All the English cases summarized above were referred to by the Court, and so much of the decisions as related to the natural use of land was approved. But the Court did not hesitate to depart from them where it became necessary to justify the use by the defendants of artificial means of disposing of the water. The Court declared that the defendants had a right to rid the mine of water, pro-

vided that they led it "into the streams which form the natural drainage of the basin in which the coal is situate, although the quantity as well as the quality of the water in the stream may thereby be affected" (p. 149).

It thus appears that not only did the Court realize the necessity of confining the right of the defendant to acts absolutely unavoidable in the natural use of the land, but they were compelled to define the meaning of "unavoidable." It was argued that the defendant might have dug a tunnel to another basin, or made a surface-drain to some distant point, but the Court perceived that such a course would only transfer the injury instead of preventing it. Perhaps, also, the danger of sanctioning such a device impressed them. So they decided, as indicated in the last quotation, that no cause of action would accrue to one who suffered loss in consequence of the operation of natural forces upon water which had been raised to the *mouth* of the mine, the earlier cases having limited the immunity to the operation of those forces upon the water where it was first discovered. No valid reason occurs to the writer why gravity should be selected as the factor by which to determine who should bear the loss when once an artificial agency has intervened. But probably the result will, in the long run, be as satisfactory as if any other arbitrary determining factor had been selected. Unfortunately, however, the appeal to a "natural" force left room for the contention made by the Court that the decision was

in harmony with the current of English authority already considered.

The limitation of the effect of the decision in the Sanderson case was recognized by the same court in *Collins v. Chartiers Valley Gas Co.* (131 P. S., 143), and the reader will note the language of WILLIAMS, J., in the principal case in referring to the Sanderson decision: "In the process of mining, subterranean veins of water are necessarily opened, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into the surface streams and pollutes them. If this could not be done, a great industry would be interfered with, and the owner of the coal land denied the exercise of the rights of ownership on his land for the benefit of a neighboring owner whose title was no greater nor higher than his own."

This, then, is in outline the present state of the law relating to the natural use of land. Criticism is foreign to the province of the annotator, but it may be proper to suggest that there is here the material for a valuable essay. Such an essay might, among other things, re-examine the legal significance of the term "the *natural* use of land." If the Sanderson decision is adhered to, it may hereafter be necessary to hold that coke-burning is a natural use of a remote and barren field, and that coal-mining is not a natural use of a tract of land so limited that the necessary drainage of the mine can be accomplished only at the expense of one's neighbor.

EDITORIAL NOTES.

BY W. D. L.

THE NEW CIRCUIT COURTS OF APPEAL.

The nomination by the President of seven out of the nine judges of the new Circuit Courts of Appeal is an event of no little importance to the bar and to the country. We, as yet, scarcely realize the part which these new courts are destined so play in the development of private law in the United States. The primary object of the act was to relieve the Supreme Court. While there is, undoubtedly, a steady decrease in the relative amount of litigation, the rapid growth of our country threw upon the Supreme Court, under the old rules of appeal, such a volume of business that the deliberation necessary to insure the permanent value of its work was rapidly becoming impossible. Latterly the most potent factor in the increase of the business of the Supreme Court was the delay attendant on an appeal, and this delay increased the advantage of an appeal to the defendant against whom an adverse decision had been rendered. One cause thus reacted on the other, the increase in the work of the court increased the delay, and the delay increased the work. Relief was essential. And on the passage of the act by the last Congress, the fact that this relief had been secured, not the importance of the tribunals which had been created, was uppermost in the minds of the profession.

We now, however, have had time to realize that practically all those cases in which the decision involves the application or the further development of the common law will hereafter be brought into these new courts for what, in most cases, means final revision. The interpretation of the laws of the several States, as far as the jurisdiction of the Federal Courts renders such interpretation necessary, also devolves upon the Circuit Courts of Appeal. To them is

given the final interpretation of the patent laws, criminal laws and revenue laws of Congress, together with the decision in Admiralty cases.

Under their review, though with a right to an appeal to the Supreme Court, pass all cases involving the interpretation of the laws of Congress, excepting always where the constitutionality of the law is drawn in question. In that event the case, as all other constitutional cases, passes directly from the Circuit or District Court in which it arose to the Supreme Court of the United States.

As far as the Federal Courts are concerned, with the exception of international law which depends upon the construction of treaties of the United States, and of the law involved in the decision of a "prize cause," the new courts have almost as wide a jurisdiction, and can affect as profoundly the development of law in this country, as the High Court of Justice in England. What is left to the Supreme Court of the United States is that body of Constitutional Law which embraces the relations of the individual citizen to the local and central governments, and the relations of these governments to each other, together with the comparatively unimportant duty of interpreting the statutes passed by Congress, with the exceptions above noted.

Besides establishing nine new courts whose importance can hardly be estimated, the act introduces a distinctly new feature into our system of appeals. Decrees of the Court of Appeals are made final in the cases mentioned, only on condition that the Supreme Court permits them to be final. The parties in the cause cannot appeal as a matter of right. The appellate court is itself made the sole judge of the expediency of the appeal, except that the members of the Court of Appeals have the right to certify to the Supreme Court any question of law on which they desire the instructions of the Superior Court.

The principle that the members of the appellate court should be the judges of the right of appeal, is a distinct step in advance, because it is a recognition of new conditions and an attempt to adjust ourselves to them.

As long as the nation was comparatively small, and the number of litigated cases was insignificant, the custom of allowing a certain amount of money to be the sole factor in determining whether a case should be appealed to the one Supreme Court for authoritative revision produced excellent results. It gave an unity to Federal law, and the delays of appeal were not so great as to defeat the ends of justice. This mechanism enabled the courts to deliver opinions with reasonable promptitude on unsettled questions of law, and thus the law on any point would be finally determined, and not left in doubt for an indefinite period. But with our growth as a nation this old mechanism is evidently unsuitable. Allowing the counsel in the causes to be the sole judges of the expediency of an appeal chokes the appellate courts with cases which involve no new principle of law, and only serves to delay indefinitely the discussion of cases upon which the profession may feel a reasonable doubt. Appellate courts were rapidly coming to a point where they were doing more harm, by delaying the execution of the just decrees of the lower courts, than good in elucidating the law.

The change in the mechanism by which a case is appealed to a final tribunal, if it proves satisfactory in practice, will have a much wider effect than simply to relieve the Supreme Court of the United States and improve the efficiency of the Federal Courts. The development of law in the United States and the interpretation of the local State statutes, at present, labor under a twofold disadvantage, which springs practically from the same source. We have forty-odd States, each with its Supreme Court, each interpreting its own statutes and the principles of common law to suit itself. On the other hand, the Federal Courts, having frequently to interpret the statutes of the various States, often take the liberty of construing them in such a way that their practical effect is totally different from that given to them by the courts of the State. Sooner or later this confusion will become intolerable, and then the fact that it is possible, in spite of the great amount of litigation, to have one Supreme Court, where the court itself is made the

judge of the advisability of the appeal, and that practically all the advantages of the appellate court are retained, may be the determining factor which will lead to a practical consolidation of the State and Federal Judiciary.

IN RE LAU OW BEW, PETITIONER.

The case of *Lau Ow Bew*, petitioner, decided by the Supreme Court on the 16th of last November,¹ is the first case which involves the construction of Section 6 of the act establishing the new Circuit Courts of Appeal. This section provides that the judges of the Courts of Appeal, in cases where their judgment would otherwise be final, may certify questions of law to the Supreme Court, or that the Supreme Court on petition may issue a writ of *certiorari* to have the entire record brought before them. The facts of the case also suggested an interesting question as to the jurisdiction of the new Circuit Courts of Appeal, as also the proper construction of the Chinese Exclusion Acts.²

It seems that the petitioner, *Lau Ow Bew*, was a natural-born subject of the Emperor of China. For the past seventeen years he had been a resident of the United States. He was, or rather is, a merchant in the city of Portland, Oregon, having a one-fourth interest in a firm which does over \$100,000 worth of business annually. In September, 1890, he left the United States on a temporary visit to China. On the eleventh day of last August he arrived on his return voyage in San Francisco. The Collector of the Port refused to allow him to land, on the ground that, although before leaving he had procured satisfactory evidence of his status as a merchant, according to the regulations in that respect of the Treasury Department (which proofs he produced to the satisfaction of the Collector), and although he

¹ Reported in p. 583, Vol. 142, of the United States Supreme Court Reports.

² An act to execute certain treaty stipulations relating to Chinese, approved May 6, 1882, 22 Stat., 58, c. 126, as amended July 5, 1884, 23 Stat., 115, c. 220.

was entitled to protection under the treaties between our Government and China, he had failed to comply with the sixth section of the Act of Congress last above mentioned. This section provides : "That every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government or such other foreign government of which at the time such Chinese person shall be subject." The treaty referred to is the one of November 17, 1880, which provided that Chinese, other than laborers, should have the right, without conditions or restrictions, to come, remain in, and leave the United States, and enjoy all privileges, immunities and exemptions enjoyed by the citizens of the United States in China. The Collector of the Port remanded Lau Ow Bew to the custody of the captain of the ship on which he had arrived. He was brought before the Circuit Court on a writ of *habeas corpus*. The Circuit Court dismissed the petition, and remanded the petitioner to custody. From this judgment an appeal was presented to the Circuit Court of Appeals for the Ninth Circuit. That Court sustained the ruling of the Circuit Court, and refused to certify any question of law to the Supreme Court. Whereupon a petition was filed in the Supreme Court for a writ of *certiorari*.

The case in the Circuit Court had been decided on the ruling of the Supreme Court in *Wan Sing v. United States*,¹ in which it was held that one who came to this country at the age of 16, remained two years, and then returned to China, where he passed seven years, was required to bring certificates of identification from the Government of China. The Supreme Court in the present case decided that the decision relied on by the Circuit Court presented such a different state of facts that it could not be said to rule the present case; and as the present case involved the construction of a statute, whose true meaning must be determined by reading it in the light of our treaties with

¹ 140 U. S., 424.

China, and of the principles of international law, it was a question of importance which should have been certified to the Supreme Court, and, therefore, the Court granted the petition for a writ of *certiorari* to bring the record of the case before them. Chief Justice FULLER, in the concluding sentence of the opinion, says: "While, therefore, this branch of our jurisdiction should be exercised sparingly and with great caution, we are of the opinion that the ground of this application is sufficient to call for our interposition."

It is by no means certain that the Court of Appeals had jurisdiction of the case. In fact, the Supreme Court only assumes the jurisdiction "for the purposes of the present discussion." The fifth section of the act establishing the Circuit Courts of Appeal provides: "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"In any case in which the constitutionality of any law of the United States, or the validity or *construction* of any treaty made under its authority is drawn in question."

The sixth section of the act deprives the Circuit Courts of Appeal of jurisdiction in all cases which may be taken direct to the Supreme Court.

The piece of legislation which is called in question is, it is true, an Act of Congress, and as such should be considered by the Courts of Appeal. But the act was passed, ostensibly, at least, to carry out the provisions of a treaty, and certainly must be interpreted in the light of that treaty. Whether it is ultimately decided that similar cases should go direct from the Circuit Court to the Supreme Court, or that the Circuit Courts of Appeal have jurisdiction, no one can doubt, in the light of the decision in *Lau Ow Bew*, the convenience of the former method. For if the rule is to be followed, that every case which involves indirectly the construction of a treaty is of sufficient importance to be certified to the Supreme Court, it would greatly expedite a final decision of the cause to take the case directly to that court, which alone can give a final

decision. The intervention of any other court is practically worse than useless. It simply multiplies tribunals.

The true construction of the treaties with China and the Restriction Acts as applied to the facts of this case, which will soon receive authoritative exposition by the Supreme Court, is one involved in considerable doubt. The treaty of 1880 provides that Chinese, other than laborers, may come and go to the United States as the citizens of any other nation. The Restriction Act of 1884 was evidently passed in good faith to carry out the true intent of this treaty. This intent is set forth in its opening paragraph :

“Whereas in the opinion of the Government of the United States the coming of Chinese *laborers* to this country endangers the good order of certain localities, etc.” Laborers who are within the United States ninety days subsequent to the adoption of the treaty are permitted to return to China or elsewhere on business or pleasure, and subsequently to re-enter the United States.

For the purpose of their identification the fourth section of the act provides that, on leaving the United States, they may obtain a certificate from the Collector of the Port, which certificate on their return identifies them and establishes their right to re-enter our country. No permission or identification on the part of the Chinese Government is required. Such identification as applied to persons who have a right to enter the country because of their previous residence would be useless. The purpose of the identification provided for in the sixth section of the act is to enable the Collector to determine whether the person seeking admission for the first time is a merchant. It is evident that the framers of the law never contemplated the case of a Chinese merchant resident in the United States desiring to visit his native country. To ask him to obtain identification as a merchant from the Government of China is absurd. On the other hand, the terms of the act providing a method of identification of Chinese who have left this country for a short time is confined by the terms of the act to Chinese *laborers*. Either, therefore, there is no necessity for the identifica-

tion of merchants returning to China, or the proofs required are impossible and absurd. We incline very strongly to the first alternative, adding this proviso: That the Collector of the Port, as an executive officer, has a right to demand of returning merchants a reasonable proof that they are merchants resident in the United States. For this there can be no more satisfactory method than the one required by Congress in the case of returning laborers, and this Lau Ow Bew is in a position to furnish.

BOOK REVIEWS.

By G. W. P.

A TREATISE ON THE LAW OF PERSONAL PROPERTY. By JOSEPH J. DARLINGTON, LL.D., of Georgetown University of Law. Founded on the Treatise of Joshua Williams, Esq. Philadelphia: T. & J. W. Johnson & Co., 1891.

The reader of this valuable work will find it a task of no little difficulty to give honor where honor is due, for it represents in text and in notes the learning and literary skill of both Mr. Williams and Mr. Darlington, while it contains a considerable number of the notes to the fourth edition of Williams on Personal Property by the American editors of that edition, Messrs. Gerhard and Wetherill. The chapter on "Ships" is by Martin F. Morris, LL.D., while Robert G. Dyrenforth, LL.D., contributes the chapter on "Patents, Trade-marks and Copyrights." It is, in fact, as Mr. Darlington states in his preface, Williams on Personal Property *minus* so much of the original text as is inapplicable in the United States, *plus* a further presentation, upon the latest English and American authorities, of topics treated in the retained text, together with sundry subjects of importance not therein discussed. The formula for determining the authorship of any given passage is thus stated in the preface: "Every paragraph of the following

¹ 40 Fed. Rep., 433.

pages, with inconsiderable exceptions, the references in which are exclusively to English authorities, is the unchanged text of Mr. Williams. All paragraphs containing both English and American citations, or the latter only, are wholly new."

The book itself is an admirable summary of the principles of mercantile law and the common law as affecting personal property. There is, from the nature of the subject, but little logical order in the sequence of topics, but the internal structure of each chapter is all that could be desired. In the chapter entitled "Of Chattels which Descend to the Heir," the summary of the law of fixtures is admirable. So is the exposition of the doctrine of suretyship, on page 150, while the statement on page 153 of the difference between a surety and a guarantor could not be improved upon. The learning on the subject of voluntary declarations in trust, and the modern development of that doctrine, are succinctly set forth on page 66. Pennsylvania lawyers who hesitate to accept the dictum of Judge Woodward in *Wallace v. Harmstead* will dissent from Darlington's statement, on page 34, that in all our States "every real vestige of tenure is," in practical effect, "annihilated." We notice the old classification of personal actions as *ex contractu* and *ex delicto* on page 107—an unhistorical classification, as Mr. F. W. Maitland demonstrates, but one which it seems hard to break loose from. The chapter on "Patents and Copyrights," contributed by R. G. Dyrenforth, is of unusual excellence, and Professor Morris's chapter on "Ships" is accurate and comprehensive.

We note singularly few errors either in typography or in substance. In Gerhard and Wetherill's note to page 39, in the synopsis of the case of *Griffith v. Ingledew* (6 S. & R., 429), there is a statement that the goods shipped were, according to the bill of lading, to be "delivered to D. or his assigns." A reference to the original report shows that "D." should be "B." This case, by the way, is well known to Pennsylvania lawyers on account of the able opinion of Chief Justice Tilghman, as well as for the vigorous dissent of Mr. Justice Gibson. The latter main-

tained in opposition to the decision of that of the majority, that where goods were consigned by A. in Liverpool to B. in Philadelphia (the shipper not acting as agent of the consignee) the transfer of the property vested an interest in the contract so as to entitle the consignee to bring suit in his own name against the carrier for negligence. It is interesting to read in this connection the note by Mr. Justice Gibson, which is printed on page 439 of the report, in which he cites the case of *Sergeant v. Kovus* (3 B. & Ald., 377) as sustaining his position, that decision not having reached this country at the time his opinion was rendered.

Mr. Darlington's literary style harmonizes well with that of Mr. Williams, and when this is said no higher praise can be given it. There are no unpleasant transitions such as one might expect in a book of composite authorship, and it possesses that which a legal work of reference may lack, but which a summary must possess—the quality of readableness. For we take it that the real value of a summary lies in the fact that the reader may obtain from it, not the materials for a brief in a particular case, but a comprehensive view of that portion of the field of law which it comprises and may see the subject under discussion in its correlation with other subjects. To this end the interest must be sustained throughout, for it may be said that such a book will be read for the sake of reading, and not merely as a necessary though unpleasant mode of accomplishing a particular purpose. But while this feature of the book is an element of strength, it is also a source of weakness. It may be doubted whether Mr. Darlington is right in ascribing the failure of Williams on Personal Property to attain in this country equal eminence with the author's work on Real Property solely to the amount of space devoted in the former to the discussion of English statutes: we venture to think that in the case of personal property students of law in the United States and the profession generally demand special works on each of those subjects to which Mr. Williams and Mr. Darlington can devote but a chapter. For a summary they are still satisfied with Blackstone and Kent, and when they desire

to investigate the law of contracts, of insurance, or of stocks and shares, they ask for a more detailed exposition than is possible within the respective limits of twenty-six, four and twelve pages octavo. In the case of the law of personal property the student who has made himself master of the learning contained in a modern edition of Blackstone is prepared without an intermediate halting-place to begin the devious journey through an exhaustive treatise on a given subject. In the law of real property, however, this is not the case. The student who has read the second book of Blackstone needs a stepping-stone—a Williams on Real Property—before he can make good use of Fearn on Remainders or of Gray on the Rule Against Perpetuities. And the reason is obvious. The common law has a system of real property law which comprises an elaborate and complicated theory of tenure, and an all-pervading doctrine of seisin. This system was developed and refined and overrefined during a period when real property was everything, and personal property was, relatively, nothing. It took such a firm hold on the courts that they even forced things personal into the mould which had been made for things real. Thus the vesting of future interests under limitations of personal property is said by the author last mentioned to be governed by the canons which apply to corresponding interests in reality. This great system must be mastered as a system before particular branches of it can be approached, and the birds-eye view of Blackstone is not, as we have already said, sufficient for this purpose. But the common law has no system of personal property. There really is no "law of personal property" to write a book about. There are all those individual subjects which give titles to Mr. Williams' chapters, but their only connection is that they are *not* governed by real property law. Little or no preliminary study is therefore required, and any one subject may be attacked forthwith. And when the plunge is made the student finds that modern law has lent itself to the development of these particular subjects as being themselves independent and autonomous divisions of jurisprudence, and not mere departments of a so-called

"law of personal property." Contract law or corporation law is not a subordinate, but a grand division.

But while these considerations may help to explain why one of these two books was found more useful than the other, they make us the more ready to admire the skill which has brought so much order out of chaos, and has combined with the general statement of broad principles so much detailed information on particular subjects. The book deserves the largest sale which such a summary can have. It contains much that the older books do not contain, and matter common to both will here be found in a more attractive form.

BOOKS RECEIVED. .

CORPORATIONS IN PENNSYLVANIA. By WALKER MURPHY. Philadelphia: Rees, Welsh & Co.

CONSTITUTIONAL LEGISLATION IN THE UNITED STATES. By Professor JOHN ORDRONAU, LL.D. Philadelphia: J. W. Johnson & Co.

LEADING CASES SIMPLIFIED: *A Collection of the Leading Cases of Common Law, Leading Cases in Equity and Constitutional Law, and Leading Cases on Criminal Law.* By Professor JOHN D. LAWSON. San Francisco: Bancroft-Whitney Co.

STORY'S EQUITY PLEADINGS, Tenth Edition, Revised, Corrected and Enlarged. By JOHN M. GOULD, Ph.D. Boston: Little, Brown & Co.

THE LAW OF CONTRACTS IN RESTRAINT OF TRADE, WITH SPECIAL REFERENCE TO "TRUSTS." By GEORGE STUART PATTERSON. Philadelphia: University of Pennsylvania Press.

THE AMERICAN DIGEST, *Annual, 1891.* St. Paul, Minn.: West Publishing Co.

ABSTRACTS OF CASES

Selected from the current of American and English Decisions.

BY

WILLIAM WHARTON SMITH, HORACE L. CHENEY,
HENRY N. SMALTZ, JOHN A. MCCARTHY.

BANKS—FORGED CHECKS—LACHES.

A banking corporation having allowed over three months to elapse before it returned to a depositor a forged check drawn on his account which it had paid, could not defend an action brought for the amount of the check upon the ground that the depositor was estopped by his laches in not giving the bank notice of the forgery immediately upon the return of the check, it having been shown that such notice would not have enabled it to relieve its loss: *Jain v. London and San Francisco Bank*, Supreme Court of California, Dec. 19, 1891 (27 Pac. Rep., 1100).

BANKS—REFUSAL TO PAY CHECKS.

Where a bank refuses to honor the check of a depositor engaged in business, who has sufficient funds on deposit to meet the check, it is liable therefor in substantial damages, even though the refusal was caused by a mistake, and there is no evidence of special damage or actual malice: *Schaffner et al. v. Ehrman et al.*, Supreme Court of Illinois, Oct. 31, 1891 (28 N. E. Rep., 917).

CHATTEL MORTGAGES—PRIORITIES OF.

An unrecorded mortgage upon chattels, though unaccompanied by any change of possession, will prevail over a subsequent recorded mortgage given to secure a prior indebtedness, provided the earlier mortgage was not kept from the records by the mortgagee for any fraudulent purpose.

The date of the chattel mortgage covering the machinery and most of the property in a mill is not affected by a subsequent agreement between mortgagor and mortgagee to substitute one article mentioned in the mortgage for another, and altering the wording of the mortgage to that effect: *L. O.*, 78 Atky. *Milton v. Boyd*, Court of Chancery of New Jersey, Nov. 5, 1891 (22 Atl. Rep., 1078).

COMMON CARRIER—RECOVERY OF DAMAGES FOR NEGLIGENCE.

Damages may be recovered by a widow for mental suffering resulting from the negligence of a railroad company in failing to carry promptly the corpse of her husband: *Hale v. Bonner*, Supreme Court of Texas, Oct. 30, 1891 (17 S.W. Rep., 605).

CONSTITUTIONAL LAW—CONTRACT IN REFERENCE TO TAXATION.

A company, who owned a bridge over a navigable stream forming the boundary of two States, for certain concessions granted by a city situated at one of the termini, gave it the right to assess and tax as realty that part of the bridge which spanned the river. Held, that the collection of

such a tax on the part of the city was not a regulation of commerce between the States and (by inference) that a State had a right to enter into a contract, like the one in question, by which it secured the right to tax property beyond its jurisdiction: *Henderson v. Bridge Co.*, 141 U. S., 679, December 7, 1891.

CONSTITUTIONAL LAW—TAXATION—TAKING OF PRIVATE PROPERTY.

A law providing that the cost of sewers in a certain district shall be assessed against each lot of ground within the district in the proportions which the area thereof bears to the area of the whole sewer district, exclusive of public highways, is constitutional: *City of St. Joseph v. Farrell*, Supreme Court of Missouri, Nov. 9, 1891 (17 S. W., 497).

CONVEYANCES—FRAUDULENT GIFTS.

Where a father makes a deed of gift of land to his son at a time when he believes his assets will cover his liabilities, though he is really insolvent, such a conveyance cannot be set aside on the ground that it is a fraud upon creditors: *Second National Bank v. Merrill Co.*, Supreme Court of Wisconsin, Dec., 1891 (50 N. W. Rep., 503).

CONVEYANCE, FRAUDULENT—NOTICE TO AGENT OF FORECLOSURE.

When an agent for the purchase of real estate has sufficient notice before paying the consideration money that the conveyance to his principal is in fraud of the creditors of the grantor, the conveyance will be set aside on application of the creditors of the grantor, though the grantee personally had no knowledge of the fraud: *Aultman & Co. v. Utsey*, Supreme Court of South Carolina, Nov. 12, 1891 (13 S. E., 848).

ELECTION—EFFECT OF DEATH OF CANDIDATE ON DAY OF VOTING.

If one of two candidates for an office dies on election day, while the election is in progress, a certificate of election will not be awarded to the other candidate if the returns show that he did not receive a majority of the whole number of votes cast: *Howes v. Court of Appeals of Kentucky*, Nov. 17, 1891 (17 S. W. Rep., 575).

EQUITY—WHEN EXECUTION OF JUDGMENT IN PROCEEDINGS AT LAW WILL BE STAYED.

When one who is the plaintiff in an action of forcible entry and detainer, having been ejected by the defendants from property which he had a right to hold until a debt due by the defendants to him under contract was paid, before the trial enters into an agreement with the defendants stating the sum which is due him by the defendants under the contract, an offer to pay this sum of money by the defendants is an equitable ground for staying the suit at law for forcible entry or detainer, or staying the execution of a judgment in such suit delivered in plaintiff's favor. The equitable ground does not arise until after the offer to pay the sum of money agreed upon as a discharge of the contract, and, therefore, though, as in this case, the offer to pay the money was not made until after the decree in favor of the plaintiff in the suit for forcible

entry and detainer had been affirmed by the Supreme Court, it nevertheless constitutes a valid equitable ground for enjoining the plaintiff in ejectment from taking advantage of the decree: *Johnson v. St. Louis Railway*, 142 U. S., 602, Nov. 16, 1891.

EXECUTION—SALE.

A trunk purchased at an execution sale was afterward found to contain certain bonds and other choses in action belonging to the judgment debtor. Held, that the purchaser did not take title to the bonds, as at common law choses in action generally could not be taken in execution; and this rule still prevails except where changed by statute: *Crawford v. Schmitz*, Supreme Court of Illinois, Nov. 24, 1891 (29 N. E. Rep., 40.)

EXTRADITION—TRIAL FOR DIFFERENT OFFENCE—WAIVER OF PRIVILEGE—HABEAS CORPUS.

(1) The rule of law in cases of foreign extradition, that a person extradited under the provisions of a treaty cannot be prosecuted for a different crime than the one specified in the warrant of extradition, applies with equal force in cases of extradition between the States of the Union; and a person who has been surrendered under extradition proceedings by one State to another, cannot, unless he waives the privilege, be lawfully tried for a different crime from that for which his extradition was obtained, while he is in custody thereunder. (2) If the accused asserts his privilege before trial, and objects to the trial on the ground that his indictment is for a crime other than that for which he was extradited, he is entitled to its benefit, although he did not plead the privilege in abatement of the indictment, and although he entered a plea of not guilty. (3) A proceeding in error and not a habeas corpus is the appropriate remedy for the review and correction of errors committed by courts while acting within the sphere of their authority. But where a court has acted outside of its jurisdiction in enacting or issuing an order or process, habeas corpus is the appropriate remedy for obtaining a discharge from imprisonment under such order or process: *Ex parte McKnight*, Supreme Court of Ohio, Nov. 17, 1891 (28 N. E. Rep., 1034).

FEDERAL COURTS—REMOVAL OF CASES FROM STATE COURTS.

Whether in an action to annul a judgment in a State Court the cause can be removed to the Circuit Court of the United States, if the parties are citizens of different States, depends upon the question whether the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or to an appeal, on the one hand, or, on the other, to a bill in equity to set aside a decree for fraud, in obtaining thereof. In the former case it cannot be removed, but in the latter case the proceeding is an original and independent one, and the cause may be removed to the Federal Courts.

If the bill in equity to set aside the decree on the ground of fraud does not allege that some of the necessary proof establishing the fraud was discovered after the judgment at law was rendered, and after the

legal period within which new trials could have been obtained had elapsed, and that the evidence could not have been obtained by diligence within such time, then, since on the face of the bill relief in equity could not be granted without breaking the rule of equity which requires diligence, and since the object of the suit is merely to obtain a review in the Circuit Court of the United States sitting in equity of issues that were or by proper diligence could have been fully determined in the suit at law in the State Court, it is proper for the State Court to refuse to recognize the right of removal.

But when, as in this, case it is distinctly alleged in the bill that the fraud was discovered after the judgment had been rendered, and the legal time for a new trial had expired, there existed a right of removal to the Circuit Court of the United States, the parties being citizens of different States, and it was not for the State Court to disregard the right of removal upon the ground simply that the amendments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance, it was for that court to determine whether the judgment in the State Court had been obtained by fraud.

Under the general principles of equity, one who is threatened with a multiplicity of suits depending upon the same facts, can file a bill to compel the plaintiffs to bring one suit, in order finally to determine the matter in dispute in all the cases; therefore, when under an agreement of counsel, the result in each of the cases not tried is made to depend upon the result of the one tried, and all the cases go to judgment as the result of the trial of that one, a proceeding by petition for an injunction to restrain the plaintiffs from taking advantage of the judgments thus obtained can, on the filing of the proper bond, be removed into the Federal Courts, the aggregate amount of the judgments exceeding three thousand dollars, though each judgment is for less than five hundred.

While a Federal Court is by statute prohibited from granting a writ of injunction to stay proceedings in a State Court, it may, as between the parties before it, adjudge that the plaintiffs in a State Court shall not enjoy the inequitable advantage obtained by his judgments, for a decree to that effect would operate upon him and not upon the State Courts. *Marshall v. Holmes*, 142 U. S., 589, Nov. 9, 1891.

GARNISHMENT—PROPERTY IN HANDS OF BENEVOLENT ASSOCIATION SUBJECT TO.

Money paid to the treasurers of a benevolent association, upon assessments, who are bound to make monthly returns of such payments, is held by them as trustees for the association, and is subject to garnishment as its property: *Supreme Court of Rhode Island*, Aug. 1, 1891, *Jepson v. Fraternal Alliance* (23 Atl. Rep., 15).

GRANT OF COAL UNDER LAND—WHAT INCLUDED IN.

A conveyance of all the merchantable coal under a certain tract of land confers upon the lessee the right to dig a tunnel into an adjoining

mine owned by him and remove the coal therefrom. A grant of all coal in a mine is a grant of the space occupied by the coal—*STERRETT, McCOLLUM and MITCHELL, J. J.*, dissenting: *Lillibridge v. Lackawanna Coal Co., Limited*, Supreme Court of Pennsylvania, Oct. 5, 1891 (22 Atl. Rep., 1035).

INSOLVENT—STOCK OF, ISSUED FOR PATENT IN NAME OF WIFE.

One who has a patent cannot, if insolvent, sell the same to a company and have shares of stock issued in his wife's name when she paid nothing therefor, as such an arrangement is merely a scheme to deprive his creditors of his future earnings: *Markham v. Whitehurst*, Supreme Court of Georgia, Nov. 4, 1891 (13 S. E. Rep., 904).

INSURANCE—CANCELLATION OF POLICIES.

Where an act of the legislature declares the charters of insurance companies of a certain class forfeited unless the provisions of the act are complied with within a limited time, the outstanding policies of such companies, issued before the passage of the repealing act, are not cancelled, nor does the fact that an outstanding policy-holder has received notice of the dissolution of a company affect his rights: *Manlove v. Commercial Ins. Co.*, Supreme Court of Kansas, December, 1891 (27 Pac. Rep., 979).

INSURANCE—POLICY IN FAVOR OF CHILDREN NON-COLLECTABLE BY ADMINISTRATOR WHERE THERE ARE NO CHILDREN BORN.

Where an insurance company by its policy agrees "to pay the sum of the insurance to the children of the insured," and the person so insured died before any children are born, her administrator cannot recover the amount of the insurance: *McElwee v. New York Life Ins. Co.*, U. S. Ct. E. D. Mo., Oct. 28, 1891 (47 Fed. Rep., 798).

JURIES—COMPETENCY OF.

A person is not incompetent to sit as a juror in the trial of a defendant charged with maintaining a place for the sale of intoxicating liquors, because he is shown to be a member of an organization whose object is the "promotion of temperance among its members by moral suasion:" *State v. Estlinbaum*, Supreme Court of Kansas, November 7, 1891 (27 Pac. Rep., vol. 27, 996).

JURISDICTION—FEDERAL COURTS—SUITS BY RECEIVER OF NATIONAL BANK.

The Circuit Courts of the United States have jurisdiction of suits brought by a Receiver of a National Bank, to recover indebtedness due to the bank, without regard to the amount involved: *Yardley v. Dickson*, U. S. C. Ct. E. D. Pa., October 18, 1891 (47 Fed. Rep., 835).

JURISDICTION—FEDERAL COURTS—INQUIRY INTO CONSTITUTIONALITY OF STATE STATUTES UNDER WRIT OF HABEAS CORPUS.

The Courts of the United States have jurisdiction in the case of a person held in custody by virtue of a judgment of a State Court, under a

State statute, which is alleged to be in violation of the Constitution and of a treaty of the United States, to inquire upon *habeas corpus* into the validity of such statute: *In re Wong Yung Quy*, U. S. C. Ct. S. Cal., February 5, 1880 (47 Fed. Rep., 717).

LICENSE LAWS—SALE OF LIQUOR BY SOCIAL CLUB.

A social club which purchases liquors in large quantities at wholesale, and serves them by the drink or the bottle at retail to its members, who, upon receiving them, sign a ticket with the cost price marked thereon, which tickets are paid for monthly or in cash, is required to procure a licence under the provisions of a city ordinance requiring licences to be obtained by places where liquors are retailed: *Kentucky Club v. City of Louisville*, Ct. of Appeals of Kentucky, Dec. 3, 1891 (17 S. W. Rep., 743).

LIMITATIONS, STATUTE OF—FORECLOSURE OF MORTGAGE.

Where there is a legal and equitable remedy in respect to the same subject-matter, the latter is controlled by the same statutory bar as the former. Therefore, when recovery on a note is barred by the statute of limitations, foreclosure of a mortgage given to secure payment of the note is also barred: *Harding v. Durand*, Supreme Court of Illinois, Oct. 31, 1891 (28 N. E. Rep., 948).

NEGLIGENCE OF CONTRACTOR—LIABILITY OF EMPLOYER.

The employer is not responsible for the actions of his employee who carries on an independent business, and who is not subject to the direction and control of the employer.

A street railway company, having authority to construct a railway in the city of Atlanta, made a contract with the Thompson-Houston Electric Company to construct the road. Owing to the negligence of the servants of the latter company the plaintiff was injured. Held, in an action against the Street Railway Company and the Thompson-Houston Electric Company jointly, verdict having been found for plaintiff against both companies, that the verdict against the railway company should be set aside, and that against the Thompson-Houston Electric Company sustained: *Fulton County St. R. Co. et al. v. McConnell*, Supreme Court of Georgia, Oct. 19, 1891 (13 S. E. Rep., 828).

NEGOTIABLE SECURITIES—PLEDGES AS COLLATERAL.]

While as a general rule a pledgee of negotiable securities as collateral security is not permitted in his dealings with the securities to accept from the parties bound in discharge of them anything less than their face value, yet where there is an agreement of all the parties to the securities, a compromise will be sustained. Therefore, where one of the two obligors, jointly indebted as principals, pledges certain choses in action as collateral security for the joint debt, the pledgee may, with the consent of the pledgor, accept less than the face value of such collateral in settlement of the same, without making himself liable to account to the other obligor for more than the sum actually received by him: *Foltz v. Hardin*, S. C. Ill., Oct. 31, 1891 (28 N. E. Rep., 786).

NOTE—RELEASE OF SURETY ON.

In a suit upon a promissory note, the surety claimed a discharge on the ground that the maker had paid \$100 on account in consideration of extension of the time of payment, the surety's original obligation being thereby altered. Held, that as it requires an additional valuable consideration, something beyond part payment of the debt, to bind the promisee to the observance of even an express promise to indulge, the original obligation was not altered, as the holder could have brought suit at any time after the note had matured, and the surety was therefore not discharged. *Hughes et al. v. Southern Warehouse Co.*, Supreme Court of Alabama, Nov. 5, 1891 (10 So. Rep., 133).

RAILROAD, CONSTRUCTION OF—CONSEQUENTIAL DAMAGES.

Where by reason of the construction of a railroad in proximity to lands, they are rendered less valuable, damages may be recovered for such depreciation in value, although no part of the land is taken, nor the ingress or egress of the owner thereof disturbed, nor his easement in a public highway interfered with: *Fort Worth and Rio Grande Rly. Co. v. Downie*, Supreme Court of Texas, Nov. 27, 1891 (17 S. W. Rep., 620).

RAILWAYS—ACTION AGAINST BY PASSENGER.

Where the agent of a railroad company delivers to a passenger a ticket which is incorrect in that it does not properly describe the trip, which ticket the conductor refuses to accept, and the passenger, being without means to pay his cash fare, is ejected, he is not restricted to an action of assumpsit for breach of contract, but may bring an action of tort for damages: *Pouilino v. Can. Pac. Rwy. Co.*, U. S. Ct. E.D. Mich., Oct. 13, 1891 (47 Fed. Rep., 85).

STOPPAGE IN TRANSITU—LOSS OF RIGHT BY CONSIGNMENT OF BILL OF LADING AS COLLATERAL SECURITY.

The assignment of a bill of lading as collateral security for the payment of a loan prevents the consignor from exercising his right of stoppage in transitu, until he has discharged the debt secured by such transfer: *Mo. Pac. Rwy. Co. v. Heidensheimer*, Supreme Court of Texas, Nov. 10, 1891 (17 S. W. Rep., 708).

TAXATION—STOCK IN UNINCORPORATED FOREIGN EXPRESS COMPANIES.

The stock of a foreign express company, which is in the nature of a partnership, not being incorporated, but whose stock is divided into shares which are transferable, liable to assessment, and considered as stock by the commercial world, is taxable under a statute which includes all stocks except those issued by the United States: *Lockwood v. Town of Weston*, Supreme Court of Errors of Connecticut, Nov. 4, 1891 (23 Atl. Rep., 9).

TRADE-MARKS—USE IN A DIFFERENT CONNECTION NOT RESTRAINED.

The word "Celluloid," being originally a fancy and arbitrary name, is a valid trade-mark, although it has since been adopted by the public as the common appellation of the substance manufactured. But its use to designate a particular brand of starch is not calculated to deceive the public as to create the impression that it is in any way connected with the substance commonly designated by that name, and its use in that manner will not be enjoined: *Celluloid Mfg. Co. v. Read*, U. S. C. Ct. D. Conn., October 7, 1891 (47 Fed. Rep., 712).

TRUST—DISSOLUTION OF.

Where a woman created a trust to secure her property from the control of her husband, from whom she was afterward divorced, and sought a dissolution of the trust on the ground that the purpose of its creation no longer existed, and it appeared that her children had a beneficial interest in the trust fund, and had not assented to the termination of the trust, the Court refused to decree a dissolution: *In re Thurston*, Supreme Jud. Court of Mass., November 19, 1891 (29 N. E. Rep., 53).

VENDOR'S LIEN.

Owners of real estate conveyed in fee, taking two promissory notes to secure a balance of unpaid purchase money. Each bore the indorsement of a security. On non-payment of the notes at maturity, the appellees filed two bills to enforce a vendor's lien upon the land. Held, that a vendor who has conveyed the property and accepted a distinct security for the purchase money, as a bond or note with security, must be presumed to have waived the vendor's lien upon the land: *Kinney et al. v. Ensminger*, Supreme Court of Alabama, November 6, 1891 (10 Los. Rep., 143).

WILL—CONSTRUCTION OF.

A testator in the first clause of his will devised certain real estate to his wife, her heirs and her assigns, and in the second clause devised the residue of his estate to her for life with a power of disposal. He then directed that if any of his estate should remain undisposed of by his wife at her death, it should be equally divided among his children, and declared "This proviso is to apply to all my estate." Held: The second clause reduced the estate granted by the first clause from a fee to a life estate with power of disposal. A power of sale superadded to a life estate does not enlarge it to a fee: *Walfor v. Hemmer et al.*, Supreme Court of Illinois, Oct. 31, 1891 (28 N. E. Rep., 806).

WRITS—SUMMONS—SERVICE OF NON-RESIDENT SUITOR, WHO IS ALSO A WITNESS, NOT EXEMPT.

An ordinary non-resident suitor who is personally interested in the result of the suit, though he may also testify in the trial as a witness, is not exempt from the service of a summons in another suit: *Supreme Court of Rhode Island*, Aug. 1, 1891, *Copewell v. Sipe* (23 Atl. Rep., 14).

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THE CONSTITUTIONALITY OF THE RECIPRO-
CITY CLAUSE OF THE MCKINLEY
TARIFF ACT.

BY C. STUART PATTERSON, ESQ.

Ever since the McKinley Tariff Act received the assent of the President, suggestions have been from time to time made that its reciprocity clause was unconstitutional in that it delegated legislative power to the Executive Department of the Government.

If the act does in fact make such a delegation, the objection is a serious one. Mr. Locke said long ago, "The legislature neither must, nor can, transfer the power of making laws to anybody else, or place it anywhere but where the people have."¹ This maxim of political science applies with special force to the Government of the United States, whose Constitution vests "all legislative powers" in the Congress, subject only to the limited veto of the President.

The McKinley Tariff Act, as approved October 1, 1890,² places "sugars, molasses, coffee, tea, and hides, raw and uncured," upon the free list.

¹ Civil Government, s. 142.

² 26 Statutes at Large, 567.

The third section of the act is as follows :

“ That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which, in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely.”

Then follows a list of duties to be imposed upon the designated articles if the President shall have suspended by proclamation under the third section the provision as to the free introduction of such articles.

The act therefore (1) admits free of duty certain specified subjects of commerce, (2) unless any foreign country exporting such articles to the United States shall impose duties upon the agricultural or other products of the United States reciprocally unequal and unreasonable, (3) the evidence of such imposition of such reciprocally unequal and unreasonable duties being a finding of that fact by the President of the United States, and then (4) the free importation of such articles into the United States shall be suspended, and during such suspension they can only be imported subject to the duties specified in the third section of the act.

The constitutionality of the reciprocity clause can be supported upon three distinct lines of argument.

I.

In *Stuart v. Laird*,¹ the Court said with regard to the right of judges of the Supreme Court to sit as Circuit Judges, that "practice and acquiescence for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

In *Briscoe v. The Bank of Kentucky*,² Mr. Justice M'LEAN, in considering the question of the power of a State to charter a bank with power to issue circulating notes, said, "An uniform course of action involving the right to the exercise of an important power by the State governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised."

In *Martin v. Hunter's Lessee*,³ wherein the appellate jurisdiction of the Supreme Court of the United States as exercisable under the twenty-fifth section of the Judiciary Act with reference to final judgments and decrees of State courts of last resort was sustained, Mr. Justice STORY said: "It is an historical fact, that this exposition of the Constitution, extending its appellate power to State Courts, was previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have,

¹ 1 Cranch, 97.

² 11 Peters, 318.

³ 1 Wheaton, 351.

from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State Courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."

In *Cohens v. Virginia*,¹ wherein the doctrine of the preceding case was applied in a criminal prosecution of one of its citizens by a State, Chief Justice MARSHALL said, "Great weight has always been attached, and very rightly attached, to contemporaneous exposition;" and he adds,² referring to the Judiciary Act, "We know that in the Congress which passed that act were many eminent members of the convention which framed the Constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts in the case therein specified to be unauthorized by the Constitution. . . This concurrence of statesmen, of legislators, and of judges in the same construction of the Constitution may justly inspire some confidence in that construction."

In *Cooper v. Ferguson*,³ wherein the question was as to the construction of a statute of the State of Colorado, Mr. Justice WOODS said, "The act was passed by the first legislature that assembled after the adoption of the Constitution, and has been allowed to remain upon the statute book to the present time. It must, therefore, be considered as a contemporary interpretation, entitled to much weight."

These authorities, so clearly recognizing the force of a contemporaneous exposition, and a subsequent legislative and judicial acquiescence as affecting and as determining

¹ Wheaton, 418.

² Page 410.

³ 113 U. S., 733.

the construction of the Constitution, are applicable to this question.

Some of the legislative precedents are these :

Section 4219 of the Revised Statutes imposed a tonnage duty of two dollars and thirty cents per ton on foreign vessels entered in the United States from any foreign port to and with which vessels of the United States are not ordinarily permitted to trade, on other vessels thirty cents per ton ; " provided that the President of the United States shall be satisfied that the discriminating or countervailing duties of any foreign nation to which such vessels belong, so far as they operate to the disadvantage of the United States, have been abolished ;¹ then eighty cents per ton."

Section 4228 of the Revised Statutes provides that the President may issue his proclamation declaring that the discriminating duties of tonnage and imposts are suspended upon satisfactory proof to him that no discriminating duties of tonnage or imposts are imposed or levied in the ports of any nation upon vessels, produce, manufactures of, or merchandise imported from, the United States.²

The Act of 1 March, 1817, c. 31,³ forbids the importation of goods in foreign bottoms, under penalty of forfeiture, but section 2498 provides that " the preceding section shall not apply to vessels or goods, wares or merchandise imported in vessels of a foreign nation which does not maintain a similar regulation against vessels of the United States," and a forfeiture under this statute was sustained in the case of *The Merritt*, 17 Wallace, 582.

The Act of 6 March, 1866, c. 12, s. 1,⁴ forbids the importation of neat cattle and the hides of neat cattle from any foreign country, and power is given to either the President of the United States, or the Secretary of the Treasury, to suspend the operation of the prohibition.

¹ The proviso of this section is a re-enactment of the Act of 31 May, 1830, c. 219 ; 4 Statutes, 425.

² This section is a re-enactment of the Act of 24 May, 1828 ; 4 Statutes, 308.

³ 3 Statutes, 351 ; Revised Statutes, s. 2497.

⁴ 14 Statutes, 3 ; Revised Statutes, s. 2493.

The Act of Congress of 9 July, 1846,¹ provided for the submission to the qualified voters of the county of Alexandria, in the District of Columbia, of the question of retrocession to the State of Virginia, created the machinery of election, and declared that, if a majority of the voters should refuse, the act should be void, and, if a majority of the voters should be in favor of accepting its provisions, it should be in full force, and that the President should then inform the Governor of Virginia of the result of the election, etc., and the retrocession should be accomplished. Under the provisions of the act the election was held, the provisions of the act accepted by the voters, the retrocession made, and no objection was ever suggested as to the constitutionality of the statute.

The Tariff Act of 2 March, 1861,² imposed certain duties upon fish and fish oil. The Act of 1 March, 1873, c. 213,³ provided that whenever the President of the United States shall receive satisfactory evidence that Great Britain and Canada have passed laws to give full effect to the provisions of the treaty of Washington signed on 8 May, 1871, he is authorized to issue his proclamation declaring that he has such evidence, and thereupon certain fish oils and fish shall be admitted free of duty from Canada.

It would be easy to add largely to these citations from the statutes, but those which have been cited are sufficient to show that the reciprocity clause of the McKinley Tariff Act is abundantly supported by legislative precedents, whose constitutionality has not been questioned.

II.

The question is also concluded by direct judicial decision.

In the case of *Aurora*, 7 Cranch, 382, the facts were, that the Act of 1 March, 1809, forbade importations into the United States from Great Britain or France, or their colo-

¹ 9 Statutes, 35.

² Revised Statutes, s. 2504, Schedule F.

³ 17 Statutes, 482; Revised Statutes, s. 2506.

nies, but the act provided that the President "be, and he hereby is authorized, in case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation, after which the trade suspended by this act . . . may be renewed, etc. On 19 April, 1809, the President issued his proclamation declaring that Great Britain had so revoked, but that proclamation was subsequently withdrawn. On 1 May, 1810, Congress passes an act, the fourth section of which declared "that in case either Great Britain or France should before 3 March, 1811, so revoke, etc., which fact the President shall declare by proclamation, and if the other nation shall not revoke within three months thereafter, then the Act of 1 March, 1809, shall be revived, etc." On 2 November, 1810, the President issued his proclamation declaring that France had so revoked. An Act of 2 March, 1811, provided that until the President declared by proclamation that Great Britain revoked, the Act of 1 March, 1809, should be in force as regards importations from that country. The *Aurora*, clearing from Liverpool on 11 December, 1810, sailed on the 16th, and arrived at New Orleans on 2 February, 1811. Her cargo was libelled, and was liable to forfeiture, if the President's proclamation of 2 November, 1810, had in law the force of reviving the Act of 1 March, 1809. It was argued that "the legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted as to the fact upon which the law should go into effect." This view was sustained by the Court, Mr. Justice JOHNSON saying, page 388, "There is no sufficient reason why the legislature should not exercise its discretion in reviving the Act of 1 March, 1809, either expressly or conditionally, as their judgment should direct."

It is difficult to distinguish between the case of "The *Aurora*" and the question under consideration, and if the reciprocity clause of the McKinley Tariff Act is to be held to be a delegation of legislative power to the Executive Department, and therefore unconstitutional, the case of the *Aurora* must be overruled.

Those who contend that the clause in question is unconstitutional rely upon those well-known cases, of which *Parker v. The Commonwealth* (6 Pa., 507); *Rice v. Foster* (4 Harrington, 479); and *Barto v. Himrod* (4 Selden, 483), are illustrations, and which hold that a legislature cannot delegate to the people of a State, or of a municipal subdivision of a State, the power of determining whether or not an act of the legislature, as, for instance, an act authorizing the granting of licenses for the sale of liquor, shall be operative in the State, or within any particular political subdivision of the State.

The ground of decision in those cases is, that the delegation of legislative power by the people to the legislature, and to the legislature only, vests exclusively in the legislature the right, and imposes exclusively upon the legislature the duty, of determining not only (1) what the terms of a law shall be, but also (2) whether or not the law shall become operative; and that to permit the people of a whole State, or of a part of a State, to determine whether the law shall become operative is as much a delegation of legislative power as it is to permit them to determine what the terms of the law shall be.

It is obvious that this principle, even if conceded to its fullest extent, has no relevancy to the question under discussion, for, as has been shown, there is not to be found in the McKinley Tariff Act a delegation to the Executive Department of power either to make the law, or to determine, in the exercise of the will of the Executive, whether or not the law shall go into effect, and the delegation, giving it its fullest effect, is only of the ministerial and essentially executive power of finding that fact, upon whose finding the law, as formulated by the legislative will, is to take effect.

But the authority of the anti-local-option cases has been shaken, and some of them have been expressly overruled, by *Locke's Appeal* (72 Pa., 491); *State v. Parker* (26 Vt., 357); *Smith v. Janesville* (26 Wis., 291), and many other cases.

The Chief Justice of the United States has said, in

Rahrer's case (140 U. S., 561), that "the principle upon which local option laws so called have been sustained is, that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to a municipality or the people to determine some fact or state of things upon which the action of the law may depend."

That dictum, so forcibly and so clearly stated, enunciates the principle, which is conclusive of the question under consideration.

III.

If the question were not concluded by legislative and judicial precedents, and if it were fairly open for argument upon principle, it would not present any serious difficulty.

Mr. Austin¹ has pointed out that the line distinguishing executive and legislative powers cannot in any government be drawn with absolute accuracy; and he adds, "that the legislative sovereign powers and the executive sovereign powers belong in any society to distinct parties is a supposition too palpably false to endure a moment's examination." Especially is this true in the Government of the United States, whose Constitution, while declaring that "the executive power shall be vested in a President," nowhere attempts to define that power. No possible act of legislation is in itself complete and effective until it be administered by the judiciary department, or by the Executive Department, and sometimes by both. For instance, a statute may declare murder to be a crime punishable with death, and may define the crime to be the unlawful and premeditated killing of a human being, but that statute cannot be carried into effect until the crime has been committed, and until the judicial department has determined that the individual charged with the commission of the crime did kill a human being, and did kill that human being, unlawfully and with premeditated intent; or, in other words, before the legislative will, as ex-

¹ "The Province of Jurisprudence Determinated," 207.

pressed in that statute, can be carried into effect, a fact, or a series of facts, must be found by the judicial department.

How does that differ in principle from that finding by the Executive Department which is essential to carry into effect the legislative will, as expressed in the reciprocity clause of the McKinley Tariff Act?

Again, the Constitution has in express terms authorized Congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" but Congress, in its exercise of that constitutional authority, was so jealous of executive usurpation of the power of the sword that, by the Act of February 28, 1795,¹ it empowered the President to employ the army and navy in the suppression of insurrections within any State only "on application of the legislature of such State, or of the Executive, when the legislature cannot be convened."

It is obvious that that act could not be carried into effect unless the President found as a fact, (1) that the legislature of a State had made an application within the terms of the act, or (2) that the legislature of a State could not be convened, and, (3) that that being so, the Executive of that State had made an application within the terms of the act. Wherein does that differ in principle from the question under consideration?

To sum up the whole matter, it can be to the fullest extent conceded that the Constitution forbids the legislative department of the Government to delegate to the Executive, or to any one, that power of legislation which has been vested exclusively in Congress, subject only to the qualified veto of the President; but it cannot be conceded that the clause under consideration does, in fact, delegate legislative power to any one. The analysis printed *supra*, page 66, shows that that which Congress has done has been to declare that certain designated subjects of commerce shall be admitted free of duty, or subject to a rate of duty specified in the act, as the President may or may not find a particular fact, viz., the imposition of reciprocally unequal

¹ 1 Statute, 424; Revised Statutes, s. 5297.

and unreasonable duties by a foreign government. In that there is no delegation of legislative discretion, for it is not left to the Executive Department to determine whether the articles in question shall be admitted free of duty, or subject to duty, nor to fix the rate of duty, if they are to be admitted subject to duty; but the rate of duty is fixed by the act, and the contingency upon which the articles are to be admitted free of duty, or subject to duty, is made by the act to turn not upon the President's will, but upon the President's determination of a fact.

PHILADELPHIA, January 28, 1892.

Court of Appeals of New York.

GEORGE H. TILDEN, RESPONDENT, *v.* ANDREW
H. GREEN ET AL., EXECUTORS,
APPELLANTS.

Court of Appeals, Second Division, Filed October 27, 1891.

SYLLABUS.

(1) WILLS—TRUST—EXECUTORY DEVISE.

T., by his will, devised the residue of his estate to his executors for two lives in being, and by its thirty-fifth article requested them to procure the incorporation of an institution to be known as the "Tilden Trust," for the purpose of maintaining a free public library and reading-room in the city of New York, and to promote such scientific and educational objects as they might more particularly designate, and authorized them to convey to such institution, if its incorporation was satisfactory, during the lifetime of the survivor of the two lives in being, all the residue of the estate or so much as they deemed expedient. In case the institution was not incorporated during the lifetime of the two persons named, or if for any cause or reason the trustees should deem it inexpedient to convey said residue to, or apply it to the use of, said institution, then they were authorized to apply it to such charitable, educational and scientific purposes as, in their judgment, would render it most widely and substantially beneficial to the interests of mankind. Held, that the devise was invalid, as there was no certain designated beneficiary who could enforce the trust, and it rested entirely in the discretion of the trustees to give such part of the estate as they deemed expedient to the Tilden Trust, or to withhold all from it.

The provisions of the will as to the residue could not be upheld as constituting a separate trust or power in trust, as the power, although not depending for its execution on the will of the trustee, could not be enforced by the courts at the suit of a beneficiary.

The fact that the executors procured the incorporation of the Tilden Trust in a form and manner satisfactory to themselves, and have deemed it expedient to convey, and have executed a conveyance, cannot be considered in passing upon the validity of the will.

The thirty-fifth article of the will did not convey separate powers upon the trustees, and the provision leaving the disposition of the estate discretionary, if the executors did not "deem it expedient" to endow the Tilden Trust, could not be eliminated from the will without destroying the scheme that the testator designed for the disposal of his estate. The whole article represented one entire and inseparable charitable scheme, and could not be subdivided, and the power conferred on the trustees was one of selection.

To render a power in trust valid, the same certainty as to the beneficiary must exist as in the case of a trust.

(BRADLEY, POTTER and VANN, J. J., dissent.)

The facts are sufficiently set forth in the opinion of the Court.

OPINION OF THE COURT.

BROWN, J.—Samuel J. Tilden died in August, 1886, leaving a last will and testament dated in April, 1884. He left surviving him, as his only next of kin and heirs-at-law, one sister, two nephews, one of whom is the plaintiff in this action, and four nieces.

The defendants, Bigelow, Green and Smith, were by the will appointed the executors thereof and trustees of the trusts therein created, and the will having been duly admitted to probate in October, 1886, they immediately qualified and entered upon the discharge of their duties as such.

This action was brought to obtain a construction of the will. By the complaint the thirty-third, thirty-fourth and thirty-fifth articles were assailed as being invalid, but upon the trial no question was raised as to the first two named, and no determination in respect thereto was made.

The Supreme Court held that the effect of the thirty-fifth and thirty-ninth articles of the will was to create one general trust for charitable purposes, embracing the entire residuary estate, and vested in the trustees a discretion with

respect to the disposition of such estate by them ; that the testator did not intend to and did not confer upon any person or persons any enforceable right to any portion of said residuary estate, and did not designate any beneficiary who was or would be entitled to demand the execution of the trust in his or its behalf, and declared the provision of the will relating to the disposal of the residuary estate for such reasons illegal and void.

It is essential, to a proper understanding of the will, to read the two articles above named together, and they are here quoted, the last being placed first :

“ *Thirty-ninth.*—I hereby devise and bequeath to my said executors and trustees, and to their successors in the trust hereby created, and to the survivors or survivor of them, all the rest, residue and remainder of all the property, real and personal, of whatever name or nature, and wheresoever situated, of which I may be seized or possessed, or to which I may be entitled at the time of my decease, which may remain after instituting the several trusts for the benefit of specific persons ; and after making provision for the specific bequests and objects as herein directed, to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, and the survivors or survivor of them in trust, to possess, hold, manage and take care of the same during a period not exceeding two lives in being ; that is to say, the lives of my niece, Ruby S. Tilden, and my grandniece, Susie W. Whittlesey, and until the decease of the survivor of the said two persons, and after deducting all necessary and proper expenses, to apply the same, and the proceeds thereof, to the objects and purposes mentioned in this, my will.”

“ *Thirty-fifth.*—I request my said executors and trustees to obtain, as speedily as possible, from the legislature, an act of incorporation of an institution to be known as the “Tilden Trust,” with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly

designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number ; and in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the lifetime of the survivor of the two lives in being upon which the trustee of my general estate herein created is limited, to wit, the lives of Ruby S. Tilden and Susie Whittlesey, I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey or apply to the use of the same the rest, residue and remainder of all my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient, but subject, nevertheless, to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume the obligations. But in case such institution shall not be so incorporated during the lifetime of the survivor of the said Ruby S. Tilden and Susie Whittlesey, or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue and remainder, or any part thereof, or to apply the same or any part thereof to said institution, I authorize my said executors and trustees to apply the rest, residue and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted, or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational and scientific purposes as, in the judgment of my said executors and trustees, will render the said rest, residue and remainder of my property most widely and substantially beneficial to the interests of mankind."

On March 26, 1887, subsequent to the commencement of this action, the legislature passed an act incorporating the "Tilden Trust," and authorizing it to establish and maintain a free library and reading-room in the city of New York. The institution was organized, and the executors and trustees made to it a conveyance which was formally accepted by the trustees thereof.

The law is settled in this State that a certain designated beneficiary is essential to the creation of a valid trust.

The remark of Judge WRIGHT, in *Levy v. Levy*,¹ that "if there is a single postulate of the common law established by an unbroken line of decisions, is that a trust without a certain beneficiary who can claim its enforcement is void," has been repeated and reiterated by recent decisions of this court,² and the objection is not obviated by the existence of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the Court can ascertain who were the objects of the power.

The equitable rule that prevailed in the English Court of Chancery, known as the *Cy-pres* doctrine, and which was applied to uphold gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of this State.³

If the Tilden Trust is but one of the beneficiaries which the trustees may select as an object of the testator's bounty, then it is clear and conceded by the appellants that the power conferred by the will upon the executors is void for indefiniteness and uncertainty in its objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of this State or of the United States, but embraces the whole world. Nothing could be more indefinite or uncertain, and a broader and more unlimited power could not be conferred than to apply the estate to "such charitable, educational and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind."

"A charitable use where neither law nor public policy

¹ 33 N. Y., 107.

² *Prichard v. Thompson*, 95 N. Y., 76; *Holland v. Alcock*, 108 *id.*, 312; *Read v. Williams*, 125 N. Y., 560.

³ *Holmes v. Mead*, 52 N. Y., 332; *Holland v. Alcock*, *supra*.

forbids may be applied to almost anything that tends to promote the well-doing and well-being of social man."¹

"Such a power is distinctly in contravention of the policy of the Statute of Wills. It substitutes for the will of the testator the will of the donees of the power, and makes the latter controlling in the disposition of the testator's property. That cannot well be said to be a disposition by the will of the testator with which the testator had nothing to do except to create an authority in another to dispose of the property according to the will of the donee of the power."²

Unless, therefore, within the rules which control courts in the construction of wills, we can separate the provision in reference to the Tilden Trust from the general direction as to the disposition of the testator's residuary estate, contained in the last clause of the thirty-fifth article, and find therein that a preferential right to some or all of such estate is given to that institution when incorporated, and one which the Court, at the suit of said institution, could enforce within the two lives which limit the trust, we must, within the principle of the case cited, declare such provision of the will invalid and affirm the judgment of the Supreme Court. The appellants claim that the power conferred upon the executors to endow the Tilden Trust may be upheld independent of the invalidity of the power given to apply the estate to such charities as would most widely benefit mankind.

The proposition is, that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of his residuary estate—one primary, for the incorporation and endowment of the Tilden Trust, the other ulterior, and to be effectual only in case the executors deemed it inexpedient to apply the residue to that corporation; and it is claimed that this provision of the will constitutes a trust to be executed for the benefit of the Tilden Trust, or confers upon the trustees a power in trust, or that it constitutes a gift in the nature of an executory devise.

¹ Perry on Trusts, No. 637.

² Read v. Williams, *supra*, p. 569.

The latter proposition rests upon the assumption that there is by the will a primary gift, complete and perfect in itself, to the Tilden Trust, that vests the title in that corporation immediately upon its creation.

That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied.¹

That question was decided in *Inglis v. Trustees of the Sailors' Snug Harbor*² and in *Burrill v. Boardman*.³

In those cases the gift was treated as in the nature of an executory devise, dependent upon the incorporation of the institution contemplated by the will, and which would vest upon the occurrence of that event.

But in view of the language of the will before us, that proposition cannot be maintained here.

By an executory devise a freehold was limited to commence in the future, and needed no particular estate to support it. It arose upon the happening of a specified event, and the fee descended to the heir-at-law until the contingency happened. By our Revised Statutes executory devises are abolished, and expectant estates are substituted in their place; and such estates, when the contingency happens upon which they are limited, vest by force of the instrument creating them, and this right in the expectant cannot be defeated by any person. But the testator here intended not to create such an estate. The Tilden Trust takes nothing by virtue of the will. The residuary estate is vested in the trustees, or intended to be, and it is solely by their action that it is to become vested in the Tilden Trust.

It is only in case that the executors deem it expedient so to do that they are to convey the whole or any part of the residuary to the Tilden Trust. Whether that corporation should take anything rested wholly in the discretion of the executors, as the expediency or inexpediency of an act is always a matter of pure discretion.⁴

¹ *Perry on Trusts*, 372, No. 736.

³ *Peters*, 99.

⁴ 43 N. Y., 254.

² *Perry on Trusts*, §§ 507, 508.

Every expression used in the will indicates the bestowal of complete discretionary power to convey or not to convey, and the creation and bestowal of such power in the executors are wholly opposed to and fatal to the existence of an executory devise.

In this respect the case differs from those cited. In *Inglis v. the Sailors' Snug Harbor*, there was no trust created, no discretion vested in the executor, no conveyance to be made after the testator's death. His intention to give his property to a corporation to be created to carry out his charitable purpose was clear. Such was the fact also in *Burrill v. Boardman*.

By the will in that case the property was given directly to the corporation which the testator contemplated should be created after his death. No trust was created, and no discretion was bestowed upon the executors to determine whether the corporation should or should not have it.

Once created, the property by force of the will vested in the corporation. The only similarity between that case and this is, that the trustees there, as here, were directed to apply to the legislature for an act of incorporation. In case the legislature refused to grant a liberal charter, then the trustees were directed to pay over the estate to the Government of the United States.

But no discretion was given to the executors to determine, upon any event, whether or not the corporation once created should take the property.

"Nothing," said Chief Justice CHURCH, "can be more certain than that the testator designed that the title to the funds or property in the possession of the trustees or elsewhere, which was included in the residuary clause, should vest in the corporation immediately upon its creation."

"An application was to be made to the legislature after the testator's death for a charter. If obtained, the bequest would take effect; if not, it would go to the ulterior donee. If the corporation applied for and granted should not be liberal, and in accordance with the provisions of the will, the ulterior donee or next of kin could challenge its right

to take the bequest. It would then become a judicial question." So, clearly, no question in that case was left to the judgment of the trustees. They were not to determine even whether the charter was a liberal one. That was a question for the Court that would have been decided in any contest over the property between the corporation and the next of kin or ulterior donee. A discretionary power in executors or trustees was not, therefore, an element in the Burrill case. Not so here. Here we have the unlimited authority delegated to the executors to withhold the entire property from the corporation if they choose so to do. There, the corporation once created was vested immediately by force of the will with the title to the property. Here, although the corporation may be created in a form and manner satisfactory to the trustees, it takes nothing unless the executors, considering every cause and reason, deem it expedient to convey to it some of or all of the residuary estate.

In the Burrill case the testator made a direct gift to a designated beneficiary—the Roosevelt Hospital. In this case Mr. Tilden gave nothing to the Tilden Trust, but simply authorized his executors to endow it if, in their judgment and discretion, they should deem it expedient. Moreover, after creating numerous special trusts and setting apart portions of his estate for such several special trust funds, the testator, by the thirty-ninth article of the will, gives the whole of the residuary estate to his executors in trust for the purposes mentioned in the thirty-fifth article, bestowing upon them, so far as language could do so, the title to all the property to be held and possessed during the lives of his niece, Ruby S. Tilden, and his grandniece, Susie Whittlesey, and which he denominated the "General Trust" of his estate. He clearly intended by this provision to create an active trust in his whole residuary estate, and to give to his executors a discretionary power to give such part of it as they deemed expedient to the Tilden Trust, or to withhold all from it. Having intended to convey, so far as he was able to do, the title to his whole estate to trustees, nothing was left that could be the subject of a gift to the Tilden Trust.

We come therefore to the consideration of the question, whether the thirty-fifth article can be upheld as constituting a separate trust, or power in trust, for the benefit of the Tilden Trust.

The affirmative of this question can be maintained only by considering the direction to convey to the Tilden Trust as a power separate by itself, and distinct and independent from the power to convey to such charitable purposes as, in the judgment of the trustees, would be most widely and substantially beneficial to mankind.

The latter provision is eliminated from the will altogether by the appellants, and then the instrument is construed as if eliminated provision had never existed.

The appellants invoke the aid of the principle, that where several trusts are created by a will which are independent of each other and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut off and the legal ones permitted to stand.

This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.

The rule, as applied in all reported cases, recognizes this limitation, that when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions were rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be construed together, and all must be held illegal and must fall.¹

The cases cited fairly illustrate the practical application of this rule by the courts.

¹ *Manice v. Manice*, 43 N. Y., 303; *Van Schuyver v. Mulford*, 59 *id.*, 426; *Knox v. Jones*, 47 *id.*, 389; *Benedict v. Webb*, 98 *id.*, 460; *Kennedy v. Hoy*, 105 *id.*, 135.

In *Knox v. Jones*, the testator created one trust to receive and pay over the income of his estate to his brother for his life, and then to his sisters, with cross-limitations over as between them, the remainder to the children of his sister Georgiana, and, in default of children, to Columbia College. This Court held the whole trust invalid, and refused to sustain the provision in behalf of the testator's brother, on the ground that there was but a single trust, which provided for all the beneficiaries, and that they were all embraced in a common purpose; that the several provisions of a single trust could not be severed, and those that violated the statute against perpetuities dropped and the others sustained. In *Van Schuyver v. Mulford*, a gift to the testator's wife of the rents and income and profits of the estate during life was upheld and declared to be valid, although the devise over might be void, on the ground that the gift to the wife was separate and distinct from the other provisions of the will, and had no effect beyond her life or upon the ultimate disposition of the estate.

In *Benedict v. Webb*, the testator created separate trusts in two-thirds of his estate for the benefit of his four children. Three of the trusts were held to be valid, and one invalid on the ground that the trust term transgressed the statute. But the Court refused to sustain the valid trusts, on the ground that to do so would defeat the intention of the testator in the disposition of his property, and work injustice among the beneficiaries by permitting three of the children to take, under their respective trusts and also as heirs-at-law, in the one-fourth as to which the trust was declared invalid.

The result of these and all other cases is, that in applying the rule invoked by the appellants, which permits unlawful trusts to be eliminated from the will and those that are lawful to be enforced, we must not violate the intention of the testator, or destroy the scheme that he has created for the disposition of his property.

We may enforce and effectuate his will, and give full effect to his intent, provided it does not violate any cardinal rule of law; but we cannot make a new will, or build up a

scheme, for the purpose of carrying out what might be thought was, or would be, in accordance with his wishes.

At the threshold of every suit for the construction of a will lies the rule that the Court must give such construction to its provisions as will effectuate the general intent of the testator as expressed in the whole instrument. It may transpose words and phrases, and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions if necessary, but only in aid of the testator's intent and purpose—never to devise a new scheme or to make a new will.

The fact that the executors of the will applied to the legislature, and procured the incorporation of the Tilden Trust in a form and manner satisfactory to themselves, and have deemed it expedient to convey to it the whole residuary estate, and have executed a conveyance thereof, is not a matter for consideration in this connection. This point was considered in *Holland v. Alcock*, and in *Read v. Williams*, *supra*, and it was held that the validity of the power depended upon its nature and not on its execution. In the latter case the testator bequeathed the residue of his estate "to such charitable institutions and in such proportion as my executors, by and with the advice of my friend, Rev. John Hall, D.D., shall choose and designate." And prior to the commencement of the action the executors, with the advice of Dr. Hall, made a written choice and designation of certain incorporated institutions existing under the laws of this State, among whom they directed the residuary estate to be divided. The fact of selection was not deemed material, and the will was declared invalid.

The rights of heirs and next of kin exist under the statutes of descent and distribution, and vest immediately upon the death of the testator.

If the trust or power attempted to be created by the will, or the disposition therein made, is valid, their rights are subject to it; but if invalid, they immediately become entitled to the property. Hence the existence of a valid trust is essential to one claiming as trustee to withhold the property from the heir or next of kin. What a trustee or

donee of a power may do becomes, therefore, immaterial. What he does must be done under a valid power, or the act is unlawful. If the power exercised is unauthorized, the act is of no force or validity. In such case there is no trust or power. There is nothing but an unauthorized act, ineffectual for any purpose.

It is not deemed material to the decision of the question now under consideration, whether the provisions of the will relating to the residuary estate are regarded as constituting a trust, or a power in trust, except so far as that fact may be indicative of the testator's intention.

If there was a trust, then the executors took title to the residuary estate; but if there is created a valid power in trust it will be executed with substantially the same effect as if the will created a trust estate. But Section 58 of the Statute of Uses and Trusts declares that when an express trust is created for any purpose not enumerated in the foregoing sections, no estate shall vest in the trustees; but the trust, if directing the performance of an act which may be lawfully performed under a power should be valid as a power in trust, is not, of course, susceptible of the construction that a trust, invalid because in conflict with some cardinal rule of law, could be upheld as a power.

Every trust necessarily includes a power. There is always something to be done to the trust property, and the trustee is empowered to do it; and if the trust is invalid because the power to dispose of the property is not one that the law recognizes, it cannot be upheld as a power in a trust. The rules applicable to the execution of trusts in this respect are equally applicable to the execution of powers; and as it is of no particular importance in this case in whom the title to the residuary estate is vested, it is not material to the decision whether the provisions of the will are examined as a trust, or as a power in trust. The purpose of the trust is lawful, and personal property, which constitutes the greater part of the testator's estate, was a proper subject of the trust that the testator intended; and if it is invalid, it is because the power conferred on the trustees for the disposal of the estate is so uncertain and

indefinite that its execution cannot be controlled or enforced by the courts.

In *Prichard v. Thompson*, the legal title to the fund was vested in the executors' trust. In *Read v. Williams*, the executors were given a power in trust. But the Court said that there was in that respect no legal distinction, and the power in the latter, as the trust in the former case, was declared invalid.

But the nature of the estate which the testator intended to convey to his trustees, and the nature of the power intended to be delegated to them, is of importance in ascertaining his intent, and determining what was the scheme that he had for the disposal of his property. By our Revised Statutes, Vol. I, p. 733, powers as they existed by the common law were abolished, and thereafter their creation, construction and execution were to be governed by statute. They are classified as general and special, beneficial and in trust. A beneficial power is one that has for its object the grantee of the power, and is executed solely for his benefit.¹ Trust powers, on the other hand, have for their object persons other than the grantee, and are executed solely for the benefit of such other persons.² Trust powers are imperative, and their performance may be compelled in equity unless their execution or non-execution is made expressly to depend on the will of the grantee.³ And a trust power does not cease to be imperative where the grantee of the power had the right of selection among a class of objects. Sec. 97 and Secs. 100 and 101 make provision for the execution by a court of equity of trust powers where the trustee dies, or where the testator has created a valid power, but has omitted to designate a person to execute it. A trust power to be valid, therefore, must designate a person or class of persons other than the grantee of the power as its objects, and it must be exercised for the sole benefit of such designated beneficiary, and its execution may be compelled in equity. A non-enforceable imperative power is an impossibility under our law unless, by the instrument creating it, it is expressly made to depend for its execution on the will of the grantee.

¹ Sec. 79.

² Secs. 94-95.

³ Sec. 96.

In every case where the trust is valid as a power, the lands to which the trust relates remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.¹

Before applying these rules to the case before us, our duty is to ascertain the testator's intent from an inspection of the will, and for this purpose we must read the whole instrument, including the provisions admitted to be void. Those provisions, though ineffectual to dispose of the property, cannot be obliterated when examining it for the purpose of ascertaining the testator's intention.²

The prominent fact in the testator's will is, that he intended to give his property to charity. He intended that none of his heirs or next of kin should take any of it, except such as he gave to them through the several special trusts that he created for their benefit. He emphasized this purpose in the last article of his will, by providing that any of them who should institute or share in any proceeding to oppose the probate of this will, or to impeach, impair, or to set aside or invalidate any of its provisions, should be excluded from any participation in the estate, and the portion to which he or she might otherwise be entitled to, under its provisions, should be devoted to such charitable purposes as his executors should designate. To the accomplishment of this purpose he intended to create a trust, and doubtless believed that he created a valid one. He created numerous trusts for the benefit of his relatives, and for the creation of other libraries and reading-rooms. These he denominated "Special Trusts." In the thirtieth article he devised and bequeathed to his executors, and "to their successors in the trust hereby created, and to the survivor and survivors of them," all the rest and residue of his property, "to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, . . . to possess, hold and manage the same" during the lives of his niece, Ruby S.

¹ 1 R. S., 729, § 59.

² *Van Kleeck v. Dutch Church*, 20 Wend., 457; *Kiah v. Grenier*, 56 N. Y., 220.

Tilden, and his grandniece, Susie Whittlesey, and "to apply the same and the proceeds thereof to the objects and purposes mentioned in this my will." He gave to his executors the power to collect the income of the whole estate, that which was set apart in the special trusts and that constituting the trust of the residuary estate. The trust of the residuary estate he denominated the "General Trust," and in the twenty-sixth article he gives direction as to the disposition of the surplus income "during the continuance of the trust of my general estate."

It is clear, therefore, that the testator intended to create a trust of his residuary estate, and in plain, unequivocal language he indicated his purpose to be, that the trustees should be vested with the title to the property until they should divest themselves of it in carrying out the purposes mentioned in the will, and which are to be found in the thirty-fifth article. Turning to this article, the important feature is, that the power there given to the trustees, and the only power that could absolutely effectuate the testator's intent to devote his property to charity, was an imperative one.

There is no discretion to be exercised upon the question whether the property shall go to charitable purposes. There is no act involving that disposition of the property, the execution of which is made to depend on the will of the trustees.

Discretion there is as to the objects of the charity, but none as to the general disposition of the estate. If the Tilden Trust is incorporated in a form and manner satisfactory to the trustees, they are authorized to convey to that institution the whole residue, or so much thereof as they shall deem expedient; and if for "any cause or reason" they deem it inexpedient to endow that institution with the whole or any part of the residue, then to apply the same, or such part as they do not apply to the use of the Tilden Trust, to such charitable purposes as they shall deem most widely beneficial to mankind.

The object and purpose in this scheme of the testator is, therefore, a devotion of his estate to charity. But it is

said that the Tilden Trust represents an intention different in form from the alternative gift to the charitable, educational and scientific purposes mentioned in the last clause of the article.

That the authority to endow it that is vested in the trustees is a primary power, and the power to devote the estate to the other undefined purposes, is ulterior.

That while the latter is imperative in its character, the former is discretionary wholly, and depends for its execution upon the will of the trustees, and that each power stands alone, separate and distinct from the other, and the power to endow the Tilden Trust is likened to a power of appointment.

Powers of appointment are so common in testamentary dispositions of property that no citation of authority is necessary to show their validity.

Their execution may depend solely upon the will of the donee of the power, and they are recognized as valid by the ninety-sixth section of the statute already quoted : "I give to A. such portion of my residuary estate as B. shall, within the lifetime of the survivor of C. and D., designate and appoint," which, in the case suggested on the brief, is undoubtedly a good testamentary bequest, and is a good illustration of a naked power of appointment, the execution of which depends on the will of B., and is not enforceable at the suit of A.

In such a case the title to the property descends to the heirs or next of kin, or passes under the will to the ulterior donee, subject to the execution of the power. But there is no similarity between the suggested bequest and the will before us. Follow that bequest by a gift over to charitable uses, or let it stand alone in the will, and you have in one case alternative gifts and in the other alternative purposes.

There is a preference, expressed or implied, by the testator as to the purpose to which his estate shall go and the objects that shall be benefited.

In the one case the choice lies between the individual legatee and the heirs ; in the other between the legatee and a disposition to charity.

But in the will before us there is no alternative purposes. There is a single scheme, a gift to charitable uses, and the suggestion of the Tilden Trust indicates no intent in the testator's mind contrary to the intention to devote the estate to charity, and in this respect the will before us is distinguished from the case suggested by the learned counsel for the appellants of a power to convey the estate to a designated individual at a stated age, and in the event of the donee of the power deeming it expedient so to do, then a gift over to undefined charitable uses.

There the primary purpose of the testator is a gift to the designated legatee and not to charity. And the intent to give the estate to charitable uses is secondary, and limited upon the determination of the trustee not to make the primary gift. Such a will plainly indicates alternative purposes and contains alternative powers. The two gifts are in no respect connected, and if the gift over is void, the first may stand, and, if executed, represents the will of the testator.

But in the thirty-fifth article of the will under consideration there is no antithesis so far as the purpose to which the property is to be devoted is concerned. It expresses a single intent only, namely, to devote the estate to charitable uses; and while, of course, in such a scheme the testator might prefer and designate one corporation over another as the object of his bounty, I shall attempt to show that in this case he has not done that, and has not conferred any preferential right to the estate, or any part of it, upon the Tilden Trust.

What is the Tilden Trust, and how does it stand in the testator's scheme?

It may fairly be assumed that the testator, having determined to devote his estate to charity, understood that his object could be accomplished only through the instrumentality of a corporate body.

He requested his trustees to cause the Tilden Trust to be incorporated. It was to have the power to establish and maintain a free library and reading-room in the city of New York, and "to promote such scientific and educational ob-

jects" as the executors and trustees should designate. The latter power is precisely what the trustees are authorized to do by the so-called ulterior provision, viz.: to apply the estate to such "educational and scientific purposes" as they should judge would be most beneficial to mankind.

Here, therefore, we have an authority to do the same thing in each provision of the will ; and as the latter could only be worked out through the medium of a corporation, the so-called two powers are the same. So as to the free library and reading-room. That is plainly within the scientific and educational purposes of the second provision of the will, and could be maintained only through a corporate body. The suggested capacities of the Tilden Trust are, therefore, precisely the same as the so-called ulterior purposes, and each is expressive of the testator's scheme so far as he had formulated it in his own mind. The Tilden Trust, therefore, plainly does not represent any alternative or primary purpose in the disposition of the estate, but is simply the suggested instrument to execute the testator's scheme for the disposition of the property. Now, what did the testator intend the trustees should consider when they came to the determination of the expediency or in expediency of endowing that institution? The argument is, that they could not consider the ulterior purposes at all until they had disposed of the question whether it was expedient to convey to the Tilden Trust all or a part of the residuary estate.

But that is saying that they should determine that question without reference to the substance of the gift and the object and purposes which the testator had in view. For, as I have already shown, the capacities and powers of the Tilden Trust—in other words, its purposes and objects, or, rather, the purposes and objects which the testator intended to effectuate through its instrumentality—are precisely the same as the so-called ulterior purposes ; and as the latter must be carried out through the instrumentality of a corporation, the only distinction between the two is in the name of the corporation that is to administer the fund. The question of expediency, therefore, resolves itself into a ques-

tion whether the trustees should select the Tilden Trust or some other corporation through which to carry out the purposes of the will. Now, how could the trustees, charged with the imperative duty of devoting the estate to charitable and educational purposes, consider the question whether they should endow the Tilden Trust without taking a complete view of the whole field of charity?

They were bound to do so if they fairly attempted to carry out the testator's plan.

Take the question of the free library and reading-room. There is no duty or obligation imposed upon them in that respect. They are not bound to create or endow one. They are free to select any other educational object. So with locality. Can it be seriously claimed that there is any duty resting on them to establish a library in the city of New York? Is not the capital of the State or of the United States open to their choice of location if they think a library located there would be more widely beneficial to mankind? Clearly, it appears to me that it was within the scope of the discretion committed to the trustees to determine whether a free library or reading-room should be established at all, and whether that or any other charitable or educational institution that they might select should be located in the city of New York, and that their determination of such question would be among the causes or reasons which might lead them to decide that it was inexpedient to endow the Tilden Trust, and that the testator intended that, when the trustees should consider the Tilden Trust, they should consider their power with reference to the disposal of the estate and the fact that if they did not endow that institution they could still execute his wishes by applying it to such charitable, educational and scientific purposes as they should select.

In other words, that if they did not give it to the institution that he suggested, and which would bear his name, they could give it to others, and still execute his will and carry out his general purpose for the disposal of his estate; and this power meant comparison of all charitable and educational objects and selection from among them.

In substance he said to his executors : I have determined to devote my estate to charitable, educational and scientific purposes. I have formed no detailed plan how that purpose can be executed, but under the law of New York it must be done through and by means of a corporation. I request you to cause to be incorporated an institution to be called the Tilden Trust, with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate ; and if you deem it expedient, that is, if you think it advisable and the fit and proper thing to do, convey to that institution all or such part of my residuary estate as you choose ; and if you do not think that course advisable, then apply it to such charitable, educational and scientific purposes as in your judgment will most substantially benefit mankind. Thus was left to the trustees the power to dispose of the estate within the limits defined, and to select the objects that should be benefited ; and it is impossible to read the thirty-fifth article and find therein any preference in the way of a separate gift or power to the Tilden Trust, or to separate that institution from the testator's plan to devote his estate to charity. The trustees are free to select the Tilden Trust and cause it to be incorporated, or to choose any existing corporation as the instrument to carry out the testator's scheme. Again, no event is named upon the happening of which any estate is limited to the Tilden Trust. The only condition suggested is the determination by the trustees of the question whether they deem it expedient to endow that institution. But if the views already expressed are correct, if the Tilden Trust is but one of many instruments through which the testator's charitable purposes may be executed, or is but a suggested beneficiary under the power, then the determination of the question of expediency involves the doing of the very thing which the law condemned, viz. : a selection from an undefined and unlimited class of objects, and the power would be void.

It thus becomes apparent how important is the so-called ulterior provision in the plan which the testator had

for the disposal of his estate ; and effect cannot be given to that plan if that provision is stricken from the will, as it expressly defines the scope of the discretion committed to the trustees.

Strike out that provision, and instead of a discretion in the trustees limited to the selection of the objects that should be benefited by the will, their power would be confined to the endowment of the Tilden Trust ; and, if they choose to act, or failed to act, the estate would go to the heirs-at-law. Indeed, the legal effect of the will would be in that case to vest the title to the estate in the heirs subject to the execution of the power to endow the Tilden Trust.

But if the provision of the will makes one thing particularly clear, it is that the testator intended his estate to be devoted to charitable purposes, and should in no event go to his heirs, and he did not intend that his trustees should have the power to choose between his heirs and the Tilden Trust.

We cannot, therefore, obliterate the so-called ulterior provision and give effect to the scheme of the will.

The discretion plainly conferred on the trustees, in the delegation of the power to determine the expediency or in-expediency of endowing the Tilden Trust, would thereby be destroyed, and the trustees would be compelled to convey the estate to that institution, or by permitting the heirs to retain it thwart the expressed wish of the testator.

Again, the appellants argue that the power to endow the Tilden Trust is one depending for its execution on the will of the trustees, and is not imperative, and hence not subject to the test whether it can be enforced in a court of equity. This argument is, perhaps, fairly answered when the conclusion is reached that the ulterior purpose cannot be stricken from the will, and that the thirty-fifth article represents but one scheme and one purpose for the disposal of the estate.

But it will be apparent, in the view taken, that the testator did not intend that any power conferred upon his trustees should depend for its execution upon their will.

Of course, in every power where the trustees have the right to select any and exclude others, there is necessarily involved discretion, and the final choice does, in one sense, rest upon the will of the trustee, but not as that term is used in the statute. The power conferred is the authority to convey the estate. That is imperative. The discretion committed to the trustee was to select the particular object. The choice depends on the trustee's will, but the act of choosing is imperative, else the power could not be executed. It is the result alone, therefore, that depends on the will of the trustees, and not the performance of the act of selection. A power is defined to be "an authority to do some act . . . which the one granting or reserving such power might himself lawfully perform."¹ Section 58 provides that if the unauthorized trust there mentioned directs the performance of any act which may be lawfully performed under a power, it shall be valid as a power in trust.

Now the acts authorized by the testator were those of selection and conveyance. The result of selection depended on the will of the trustees, whether they should choose one corporation or another, but the performance of the act of selection was just as obligatory as the duty to convey. The testator intended both should be performed, and the trustees could no more refuse or neglect one than the other. It follows from the views here expressed that the authority to endow the Tilden Trust, if that should be deemed expedient by the trustees, was not a separate power, distinct from the purpose to devote the estate to charitable uses, but was incidental to the testator's scheme and involved therein.

While we may admit that the testator expressed a preference for a corporation that should bear his name, he conferred no right upon that institution. The purpose to which the estate should be applied he determined and designated, but the persons who should be benefited by the will and the particular institution that should administer the fund were left to the selection of the trustees.

The expression of a preference conferred no right, so long as the final choice was left to the trustees.

¹ 1 R. S., 732, 74.

It was simply a suggestion, which they might or might not adopt, and imposed no duty upon them and in no way limited or fettered their action.¹

We are of the opinion, therefore, that the thirty-fifth article of the will does not confer separate powers upon the trustees, and that the so-called ulterior provision cannot be eliminated from the will without destroying the scheme that the testator designed for the disposal of his estate ; that the whole article represented one entire and inseparable charitable scheme and cannot be subdivided, and the power conferred on the trustees is one of selection.

This power was, under the statute, special and in trust. Under the sections heretofore quoted such a power is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested, unless its execution or non-execution is made expressly to depend on the will of the grantee, and it does not cease to be imperative where the grantee has the right to select any and exclude others of the persons designated as the objects of the power.

The power conferred by the will not being made to depend for its execution on the will of the trustee was, therefore, imperative, but it is not valid unless it can be enforced by the courts at the suit of some beneficiary.

As the selection of the objects of the trusts was delegated absolutely to the trustees, there is no person or corporation who could demand any part of the estate or maintain an action to compel the trustees to execute a power in their favor. This is the fatal defect in the will. The will of the trustees is made the controlling, and not the will, of the testator. Such an authority is in contravention of the statute of wills.

That statute authorizes a person to "devise" his real estate and "to give and bequeath" his personal property, but it does not permit him to delegate to another the power to make such disposition for him.

As was said by the learned presiding Justice of the

¹ *Lawrence v. Cooke*, 104 N. Y., 632 ; 2 *Pomeroy's Eq. Juris.*, 1016, note.

general term : "The radical view of the entire provision seems to have arisen from the testator's unwillingness to confer any enforceable rights upon any qualified person or body."

Under the statute of powers there may be a power of selection and exclusion with regard to designated objects, and the duty there imposed is made imperative and enforceable by the Court.

But the statute presupposes that a power of selection must be so defined in respect to the objects, that there are persons who can come into court and say that they are embraced within the class and demand the enforcement of the power.¹

The views which Judge VAN BRUNT expressed in that case on that point at general term received direct approval in the court. He said: "It is conceded that the power contained in the clause in question comes under the head of a special power in trust as defined in the Revised Statutes, but it is said such a power is to be distinguished from a trust; that the words 'in trust' are used for purposes of classification only." We think, however, that to render a power in trust valid the same certainty as to beneficiary must exist as in the case of a trust.²

These views find full confirmation in the provision of the statute to the effect that if the trustee dies, leaving the power unexecuted, a court of equity will decree its execution for the benefit equally of all persons designated, and if the testator fails to designate the person by whom the power is to be executed, its execution develops upon the court (sections 100 and 101), thus providing a scheme which prevents the failure of a testator's purpose when its subject is certain and its objects designated.

But in this case execution of the power could not be decreed by the Court in either of the cases specified in the statute.

By an enforceable trust is meant one in which some person or class of persons have a right to all or a part of a

¹ Read *v. Williams*, *supra*, p. 569.

² Read *v. Williams*, 27 N. Y. State Rep., 507.

designated fund, and can demand its conveyance to them, and in case such demand is refused, may sue the trustee in a court of equity and compel compliance with the demand.

In this case the testator devolved upon his executors the duty of selecting the beneficiary, and there is no person who has the right to enforce that duty or demand any part of the estate in case the executors refuse or neglect to act.

The power attempted to be vested in the trustees cannot be controlled or enforced, and whether the provisions of the will relating to the residuary estate be regarded as creating a trust or power in trust, they are in either case void.

The judgment must be affirmed.

DISSENTING OPINION.

BRADLEY, J. (dissenting).—This action, for the construction of the will of Samuel J. Tilden, deceased, was founded on the charge that it was ineffectual to dispose of the residuary estate, or to provide for any lawful disposition of it, because the provisions of the thirty-fifth article, by which that was sought to be accomplished, were invalid in that they were, as to both the object and subject of the trust he had in view, indefinite and uncertain. If this proposition is supported, the conclusion that such was the effect necessarily follows.

It is evident that the testator, when he made his will, intended not to die intestate as to any of his property. And that his purpose to make testamentary disposition of all of it, not only appears by the dispositional provisions of his will, but also by those of the forty-third article, by which he declared: "Since I have made a disposition of my property according to my best judgment, and since, as most of the devisees under it are females, it is impossible to foresee under what influences some one or more of them might possibly come; and since it is desirable to avert unseemly or speculative litigation, I hereby declare it to be my will that in case any person who, if I had died intestate, would be entitled to any share of my property or

estate, shall, under any pretence whatever, institute, take or share in any proceeding to oppose the probate of this my last will and testament, or to impeach or impair, or to set aside or invalidate any of its provisions, any devise or legacy to or for the benefit of such person or persons under this will is hereby revoked, and such person shall be excluded from any participation in, and shall not have any share or portion of my property or estate, real or personal; and the portion to which such person might be entitled, under the provisions of this instrument, shall be devoted to such charitable purposes as my said executors and trustees shall designate."

In proceeding to the consideration of the questions presented, it may be observed, as a cardinal rule of construction, that the intent of a testator should be sought for in the provisions of his will, and, when so ascertained, effectuated, if the language used permits, although the transposition, rejection or the supply of words may be required to clearly express such intention. And when susceptible of it, the construction will be given which renders it operative rather than invalid.¹

He had in view the creation and endowment of a Tilden Trust, with the capacity mentioned. He, therefore, requested the executors and trustees to obtain as speedily as possible from the legislature an act of incorporation of an institution to be known as the Tilden Trust, and in case that should be accomplished within the time limited by the two lives mentioned, he authorized them to organize the institution, and to convey or apply to its use the rest, residue and remainder of his estate, or so much of it as they should deem expedient. Thus far he has, in practical effect, directed the application to be made for legislative action, and has made no provision for the disposition of the fund other than to the use of the corporation in the event of its creation. And because that was a contingency not within the control of the executors and trustees, and for other reasons which might exist at the time of his

¹ *Hoppock v. Tucker*, 59 N. Y., 203; *Phillips v. Davies*, 92 *id.*, 199; *Du Bois v. Ray*, 35 *id.*, 162.

death to render the endowment of the Tilden Trust, if created, inexpedient, the testator, with a view to entire testacy, added: "But in case such institution shall not be so incorporated, . . . or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue and remainder, or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize" them to apply it, "or such portion thereof as they may deem inexpedient to apply to its use, to such charitable, educational and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue and remainder of my property most widely and substantially beneficial to the interests of mankind." This provision, treated independently of any other, requires no consideration. The *cy pres* doctrine, available to give effect to trusts for charitable uses, without any defined beneficiary in England, has no place in the law of this State. The attempt thus made by the testator to provide, in the event mentioned, for a trust dependent upon the selection by the executors and trustees of the charitable, educational and scientific purposes to which the fund should be applied, was ineffectual and void for indefiniteness and uncertainty.¹

The proposition on the part of the appellants is, that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of the residue of his estate; that the one relating to the incorporation and endowment of the Tilden Trust was primary, and the other following it was ulterior, and intended (if that institution was incorporated) to be made effectual in the event only that the executors and trustees deemed it inexpedient to apply such residue, or only a portion of it, to the Tilden Trust. On the contrary, the counsel for the respondents contend that there are no such separate alternative provisions in the article, but that the testator there provided for the disposition by the trustees of his residuary estate to charities, etc., of which the Tilden Trust was one of the

¹Prichard v. Thompson, 95 N. Y., 76; Holland v. Alcock, 108 *id.*, 312; Read v. Williams, 125 N. Y., 560.

objects, and that the power given to the executors and trustees was that of selection merely. In some cases it has seemingly been held that when words of a will, expressing a class of beneficiaries or objects of a trust may be taken distributively, and some of them are lawful objects of the trust and others not, it may be effectual as to the former; but the weight of authority is otherwise, and in such case the power of mere selection in execution of the trust, attempted to be so given, is wholly void.¹

If that view, as applied to the present case, is supported, the conclusion must follow that the testator failed by his will to make any valid provision for the disposition of his residuary estate. Then the trusts and the power which the testator attempted to create and vest in his executors would constitute a single scheme for the appropriation of the fund by them to such charitable, educational and scientific purposes as they should choose to select. But a different question is presented if the provision relating to the creation and endowment of the Tilden Trust may be legitimately treated independently of that following it, by which he sought to make provision for such general undefined purposes. Then the effect of the former would not necessarily be embarrassed by any relation to the latter.²

The disposition of this question depends upon the construction to which that article of the will may be entitled, having in view the principles applicable to the interpretation of such instruments.

As has already been seen, the first duty imposed upon the executors was to seek, by legislative act, the incorporation of the Tilden Trust. And it may be assumed that this was not required or designed as a useless ceremony. When that should be effected they were authorized to organize the corporation, designate its first trustees, and convey to it or apply to its use the residue of his estate, or so much of

¹ *Williams v. Kershaw*, 5 Cl. & Fin., 111; *Vezey v. Jamson*, 1 Sim. & Stu., 69; *Ellis v. Selby*, 1 My. & Craig, 286; *Mitford v. Reynolda*, 1 Phillips, 190; *In re Jarman's Estate*, L. R., 8 Ch. Div., 584; 25 Moak, 490.

² *Savage v. Burnham*, 17 N. Y., 561; *Schettler v. Smith*, 41 *id.*, 328; *Manice v. Manice*, 43 *id.*, 303; *Kennedy v. Hoy*, 105 *id.*, 134.

it as they should deem expedient. We need go no further to see the purpose for which the Tilden Trust was intended in its relation to the fund. How is the purpose so represented necessarily qualified by any of the provisions following it? There were certain contingencies in view which would have the effect to defeat the execution of the power to endow such an institution, and upon which the limitation of the fund or some portion of it to general charitable, educational and scientific purposes was provided for. The first was the failure to obtain the incorporation of the Tilden Trust. In that event the testamentary disposition of the residue of the estate was dependent upon such provisions for application to charitable, etc., purposes. But if it should be incorporated, the contingency depended upon the determination of the executors and trustees, to the effect that it was expedient to apply a portion only, or inexpedient to apply any part of the fund to that institution. It quite plainly appears that the testator intended, that if legislative action could be effectually had for that purpose, the Tilden Trust should be incorporated, and, that being accomplished, its endowment should first be considered and determined; and that in the event only that it should by the trustees be deemed inexpedient to apply to it any of the residue of his estate, or expedient to apply to it less than the whole of such estate, would there be any occasion to seek other charitable, educational or scientific purposes to which to appropriate the fund, or any portion of it.

It is urged that, because the gift of the testator is, by the terms of the will, made to the executors and trustees, their power is that of selection, and consequently there is no limitation created by the testator, and can be no primary or ulterior gift within the import of the language employed. But gifts may be made by a testator by means of powers vested in trustees to whom the estate is devised and bequeathed, and limitations contingent in character may be dependent upon the execution or non-execution by the trustees of powers conferred upon them. The question whether the provisions for the disposition of the residuary estate are or are not alternative, primary and ulterior, is one of con-

struction. The fair interpretation of the language of the thirty-fifth article permits, and the evident intent of the testator as there manifested requires, the conclusion that the two are alternative provisions, and that they are primary and ulterior. The former is definite in its object; the latter is otherwise.

It is true, that by the terms of the thirty-ninth article the testator devised and bequeathed all of his residuary estate to the executors and trustees for the purposes mentioned in the will. This is designated at other places in his will as "general trust," to distinguish the residuary fund from the various special trusts created by the will. But this does not necessarily qualify or modify the construction to which the provisions of the thirty-fifth article would otherwise be entitled in the respect we are now considering them. The manner in which the fund should be applied was dependent upon contingencies, some of which were within the powers vested in the executors and trustees. Yet the purpose of the devise and bequest must be considered in reference to the power conferred upon them by the provisions of that article, and in view of the manner in which it might, by virtue of those provisions, be properly executed.

The arbitrary exercise of power may characterize the effect which may be given to it, rather than its purpose. So in the present case the executors and trustees could have unfaithfully exercised their discretion upon the question of expediency. But while the test of expediency or in expediency was left to their discretion, they could not, consistently with the intent of the testator, as plainly manifested by his will, have applied any part of the fund to the purposes of the general charity mentioned in such ulterior provision until they had in good faith determined, for "some cause or reason," that it was inexpedient to apply it or some, and what portion of it, to the Tilden Trust.

And although the exercise of discretion may not be subject to judicial control or review, it may be said that, for the purpose of interpretation, it is the intent of the donor so made to appear that properly measures the discre-

tionary power of those who are to execute it, and not the opportunity for its unfaithful execution found in its discretionary character. The power vested in the executors and trustees was not that of a mere selection of a beneficiary or beneficiaries amongst all the objects which were employed within the scope and meaning of the thirty-fifth article ; they were not authorized to reach the consideration of the undefined objects of charity, etc., there referred to, for the purpose of selection from them, until they had disposed of the question whether the specific beneficiary, the Tilden Trust, should or not be endowed. That was the definite object to which their attention was first to be directed, and the question of the application to it of the fund to be determined. This the trustees were to do before any matter of selection from amongst indefinite charities was reached. The scope of inquiry for that purpose was to be extended to other objects "if for any cause or reason" they should deem it inexpedient to apply any part of the residuary fund or expedient to apply less than the whole of it to the Tilden Trust, and not otherwise. This seems to have been the purpose the testator had in view, as appears by the provisions of that article. This is not repugnant to any other provision of the will. And his intent, as manifested by the language used, must be effectuated if it can be consistently with the rules of law.¹

The provision for the Tilden Trust must, therefore, be treated as primary and distinct from that of general charities, etc. And the question whether or not the former provision was effectually made remains to be considered. It is requisite to the validity of any provision of a will that it is or may become capable of lawful execution ; and that test is applicable as of the time of the death of testator. There may be future contingencies provided for upon which gifts are made to depend, and beneficiaries may not be definitely known or ascertained at the time of the testator's death. It is sufficient that they are so described as to be ascertained in the future when the right accrues to re-

¹Smith v. Bell, 6 Peters, 68; Wager v. Wager, 96 N. Y., 164; Roe v. Vingt, 117 *id.*, 204.

ceive]the gift : *Holmes v. Mead*, 22 N. Y., 322 ; *Shipman v. Rollins*, 98 *id.*, 311. And a devise or bequest may be limited to a corporation not in existence at the time of the death of the testator, provided it is created within the time allowed for vesting of future estates. This question was considered in *Inglis v. Sailor's Snug Harbor*, 3 Peters, 99 ; *Ould v. Washington Hospital*, etc., 95 U. S., 303 ; and in this State it was so determined in *Burrill v. Boardman*, 43 N. Y., 254, and reaffirmed in *Shipman v. Rollins*, 98 *id.*, 328. In the *Burrill* case it was treated as in the nature of an executory devise dependent upon incorporation of the institution there contemplated, and it was held that the estate vested on the occurrence of that event. In that respect that case is distinguishable from the present one, as in the latter it was contemplated that the vesting should depend upon the conveyance to the Tilden Trust or application to its use by the executors and trustees to whom, by the terms of the will, the residuary estate was devised and bequeathed. This distinction arises out of the fact that upon the contingency which enabled the institution in the *Burrill* case to take the fund, the trust upon which the trustees held it terminated, and there was no opportunity remaining for any limitation over, while it was otherwise in the case at bar. But, treating the provisions of the thirty-fifth and thirty-ninth articles of the will as creating a trust power, it is not seen that the fact that the estate did not vest in the corporation on its creation necessarily has of itself any essential importance for the purpose of the question now under consideration, provided the power was adequately given to convey or apply it to the use of the institution. While it could not in that case be deemed what was formerly known as an executory devise, it might, in behalf of the Tilden Trust, be treated as a conditional limitation of the estate or a power dependent for its execution upon a condition.

The testator evidently intended to vest in the executors and trustees all the control he could of the title to his residuary estate. But it cannot, for the purposes of the question here, be assumed that he intended their relation

to it should be other than the legal effect of that which they took by the will. As to the realty, no title passed to the trustees, and no trust within the statute was created. When, by the statute, express trusts were reduced to those for the execution of which taking of the title was deemed essential, 1 R. S., 728, § 55, it took from others none of the elements of trusts other than such as were dependent upon the title as formerly taken by trustees, and none of the powers of execution not so dependent. And it was provided, that when an express trust should thereafter be created for purposes other than those enumerated in § 55, no title should vest in the trustees, but if the trust directed or authorized the performance of any act which might lawfully be performed under a power, it should be valid as a power in trust: *Id.*, 729, § 58. If, therefore, the provisions of the thirty-fifth article of the will would, but for the statute, have constituted a trust, and authorized the performance of any act which might lawfully be performed as such, they, so far as related to the real property in the residuary estate of the testator, created a power in trust. And although the large part of such estate was personalty, and the trust, as to that, is not subject to the statute, the distinction in that respect, for the purposes of the questions requiring consideration, need not be observed, as the subject of powers is substantially applicable alike to both.¹

It is urged that by the provisions in question the testator neither directed nor authorized the performance of any act of disposition of the residuary estate which could lawfully be performed within the meaning of the statute defining a power in trust; and that there was not only no party to effectually demand their execution, but they had no enforceable character. It is true, the creation of a trust depends upon the nature of the provisions by which its creation is sought. It is also the rule that a trust is imperative; and at common law the same rule is applicable to a power coupled with a trust, although otherwise as to a naked power.²

¹ Cutting v. Cutting, 86 N. Y., 522; Hutton v. Benkard, 92 *id.*, 295.

² 2 Story Eq. Jur., § 1061.

The primary one of those provisions certainly was not enforceable at the death of the testator. There was then no Tilden Trust; and its then future existence was contingent. When it was created, its ability to take depended upon its incorporation being in form and manner satisfactory to the executors and trustees, and that being so, it was made discretionary with them whether the institution should have the whole, or any, and what portion, of the residuary fund. It would, therefore, seem to follow that upon the incorporation of the Tilden Trust it could not, without action of the trustees, have enforced conveyance or application to it of the fund or any portion of it. In that view, and upon the construction given to the thirty-fifth article, the question is whether the trustees were enabled to vest the fund in the Tilden Trust, or by the exercise of discretionary power given to them could have afforded to that institution the right to demand and enforce, in that respect, the execution of the provision of the will in its behalf. As already seen, the testator did not intend to die intestate as to any portion of his property; and that he did intend to impose upon his executors and trustees the imperative trust power for the disposition of his residuary estate appears by the provisions of the thirty-ninth article, by which he directed them "to apply the same and the proceeds thereof to the objects and purposes mentioned" in the will. This is borne out by the terms of the thirty-fifth article, by imputing to him the understanding that the secondary provision of that article was valid, as upon the contingency there mentioned he provided for the disposition of it. And the latter provision cannot be overlooked, but must be consulted to ascertain his intent with a view to the aid, so far as it may furnish it, to the interpretation of the other provision in question.¹ But if the primary provision was of itself valid in its object, purpose and effect, it was not invalidated by the fact that the trustees were, in terms in the event stated in the article, empowered to apply the fund to the indefinite purposes men-

¹ *Van Kleeck v. Dutch Church*, 20 Wend., 457, 471; *Kiah v. Grenier*, 56 N. Y., 220.

tioned in the ulterior provision for which testamentary disposition of property could not lawfully be made.¹

In other words, the limitation to the indefinite objects did not deny to the former provision for the Tilden Trust the effect to which it otherwise may have been entitled.² In such case the subject would be within the control of the Court, and on proper application it would restrain the use of power for such unlawful purpose. The contention of the respondents' counsel is, that it was essential to the validity of the provision in behalf of the Tilden Trust, that the residuary estate should have vested in it at the time it came into corporate existence, or that the institution should then have been entitled to demand and enforce, by decree of the Court, the conveyance to it or the application to its use of the fund by the trustees. This proposition (upon the construction here given to the provisions in question) in effect seems to be, that a trust or trust power could not exist with or survive the intervention of the discretionary power which the testator intended to give the trustees. But it may be observed, that while a valid trust is imperative, attending it may be powers upon which limitations and executory bequests may be contingent, and the exercise of those powers may be in some sense discretionary.³

It is very likely that if the testator had apprehended the invalidity of the ulterior provision of the thirty-fifth article, he would have provided a different limitation in the event there mentioned. But it cannot be assumed that the primary provision for the appointment and disposition of the residuary estate to the Tilden Trust would have been other than that which he made.

The efficiency of the power given by this provision is

¹ *Atty.-Genl. v. Lonsdale*, 1 Sim., 105; *Saulsbury v. Denton*, 3 Kay & J., 529; *Carter v. Green*, *id.*, 591.

² *Savage v. Burnham*, 17 N. Y., 561; *Kennedy v. Hoy*, 105 *id.*, 134; 6 N. Y. State Rep., 787.

³ *Hawley v. James*, 5 Paige, 318, 468; 16 Wend., 61, 176; *Mason v. Jones*, 4 Sandf. Ch., 623; 13 Barb., 461; *Costabadie v. Costabadie*, 6 Hare, 410; *French v. Davidson*, 3 Madd., 396; *Walker v. Walker*, 5 *id.*, 424; *Cole v. Wade*, 16 Ves., 27.

not dependent upon the character of the ultimate limitation, nor is it less effectual than it would have been if that had been to a lawful object of testamentary gift. The difference is, that in the one case it was within the power of the trustees to defeat the disposition by the will of the residuary estate, and in the other they could not.

But in the latter case they, by the execution of the discretionary power, could have rendered the ultimate provision ineffectual and, for the purposes of the disposition of the fund, inoperative. And, therefore, unless the contingency arose upon which the ultimate limitation of it was dependent, it would not be important for any practical purpose whether it was valid or not, and in that event only would an enforceable character of the trust or trust power be essential to effectuate the intent of the testator. His purpose, it must be assumed in view of the power given, would be accomplished by the disposition to the incorporated institution designated by him. The creation of this power in nature and purpose was lawful, and through its execution the gift to the Tilden Trust could legitimately be effected, although in respect to the appointment to that institution it was made dependent upon the will of the executors and trustees. While it is essential to a trust, as such, that it be imperative and therefore enforceable by decree in equity when the time arrives for its execution, it is not so of a mere power, or necessarily so of a trust power, although the latter is imperative, unless its execution or non-execution is made expressly to depend upon the will of the grantee. The testator intended to make the execution of the power of appointment to the Tilden Trust dependent upon the will of the trustees, as expressly appears by the provision creating it. The contention, therefore, that this power of the primary provision was invalid because its execution was not judicially enforceable in equity on behalf of that institution, does not in the view taken seem to be maintained. The imperative character intended by the testator to be made applicable, and in a certain event to be applied to the disposition of the residuary estate, had relation to the ultimate limitation, which

was dependent upon the contingency that the trustees, in their discretion, concluded not to appoint to the Tilden Trust any or only a portion of such fund. And as such limitation was invalid for indefiniteness and uncertainty in its object, the testator failed by it to effectually make any imperative provision for the disposition of the residuary estate by means of a trust, power in trust, or trust power enforceable as such, except so far as should be necessary to make and keep good the special trusts as directed.

And as the will furnished no support for an ultimate limitation of the fund in the event the trustees should have deemed the execution of the power of appointment to the Tilden Trust inexpedient, the real property within the residuary estate descended to the heirs of the testator subject to the execution of the power of appointment and disposition to that institution, and the right of his next of kin to the administration in their behalf of the personalty of such estate was subject to the execution of the same power.

Now, by reference again to the provisions of the thirty-fifth article, it may be seen, as plainly appears by their terms, that the testator intended that the trustees should exercise the power conferred upon them to consummate the disposition of the residuary estate for the declared purposes of the trust. If they were successful in their effort to obtain the corporate charter, it was their duty to determine whether it was satisfactory, and in the event it was so, then, unless they deemed it inexpedient to apply any part of the fund to the Tilden Trust, the further duty was imposed upon them to determine whether it should take all of it, and if not all, to appoint the amount of it so to be appropriated. It is apparent that the testator intended to make the exercise of such power a duty, and essentially so, to carry out his declared purpose. The discretion which he evidently intended to give the trustees related not to the execution of the power, but only to the manner of its execution. In that view (which seems well supported) may not the limitation to the Tilden Trust have been lawfully conditional, not only on its incorporation, but as well upon the manner such preliminary power, discretionary only in that respect, should be executed?

In *Ould v. Washington Hospital*,¹ the estate for the purposes of the trust was devised to trustees with a view to the incorporation, after the death of a testator, of an institution to which they, in that event, were to convey the estate, provided the corporation was approved by them ; otherwise not. The hospital was incorporated, and conveyance made to it by the trustees. The validity of the trust was contested, and the Court held that the provision relating to a conveyance upon the creation of a corporation approved by the trustees was a conditional limitation of the estate vested in them.

In that was involved the discretionary power of the trustees relating to the approval of the corporation. It is essential that the object and subject of a testamentary dispositional provision be definite, and when so designated that they are or may become such, and properly ascertained, a limitation may by the testator be made to depend upon a future condition having regard to the statute of perpetuities, and such condition may consist of a power resting in the discretion of a trustee provided for and defined by the will ; and when the condition is fulfilled the limitation may be enforced.

The doctrine of the common law on the subject of powers of appointment and selection, except so far as it permitted the treatment of them as illusory, is consistent with the statute relating to powers which provides that "a power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform."² The powers now under consideration are a special power, and a special power in trust, which, as defined by the statute, are those where the persons, or class of persons to whom the disposition of lands is to be made under the power, are designated, *id.*, § 78 ; and, "1, when the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power, entitled to the proceeds or any portion of the proceeds, or other benefit to result from the

¹ 95 U. S., 303.

² 1 R. S., 732, § 74.

execution of the power ; 2, when any person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power.”¹

The provisions of the thirty-fifth article of the will *in terms*, in view of those of the thirty-ninth article, created a special power in trust ; and because the testator intended that his residuary estate should be disposed of, as directed by his will, for the purposes of the trusts there mentioned, the provisions were apparently imperative ; such, at all events, would have been their effect if the ulterior disposition to which the estate was conditionally limited had been valid.

And the statute provides that “every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled, in equity, for the benefit of the parties interested.”² The ultimate limitation was, by the terms of the will, imperative in the event that the trustees failed, for any cause, to dispose of the fund under the primary one, which alone was made dependent upon their discretionary power. The Tilden Trust could take only through the power in the nature of that of appointment vested in the trustees ; and the fact that the exercise of that power was discretionary, and could not been forced, produced no legal infirmity in the provision relating to that institution, its ability to take and to the limitation to it dependent upon such appointment.³

So far as the statute relates to the subject of the power of appointment, it provides that where, under a power, a disposition is directed to be made amongst several designated persons, without specification of the share to be allotted to each, all of them shall be entitled in equal proportion.⁴ But when the terms of the power import that

¹ R. S., 734, § 95.

² *Id.*, 734, § 96.

³ *Chatteris v. Young, Madd. & G.*, 30 ; *Lancashire v. Lancashire*, 1 DeG. & Sm., 288 ; 2 Phillips, 657 ; *Cole v. Wade*, 16 Ves., 27 ; *Perry on Trusts*, § 508 ; *Hill on Trustees*, 490-2.

⁴ R. S., 734, § 98.

the fund is to be distributed between them in such manner or proportion as the trustee may think proper, he may allot the whole to any one or more of such persons in exclusion of the other.¹ The trust power in such case does not cease to be imperative.² And if the trustee having such power shall die, leaving it unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons so designated.³ These provisions of the statute are, in that respect, substantially declaratory of the common law.⁴ It was there, as it is by our statute, a trust power. And it is not important for the purposes of the question, whether the designated persons are vested with the fund subject to the execution of the power, or take by reason of the power given. In the one case there is a gift expressed, and in the other implied, which will be executed by decree of the Court in default of execution of the power by the donee of it.⁵

No such implication arises where there is a limitation over of the estate or fund to other objects in default of the execution of the power by the donee; and, in that case, the objects of the power take nothing as their beneficial interest, or the limitation to them is wholly dependent upon the execution of the power by him.⁶ And although the power of appointment and selection rests in the discretion of the trustee, it is valid, and may be effectually executed by him.⁷

In the present case, the provision relating to the Tilden Trust conferred upon the trustees a power of appointment and disposition to a definite object, with a limitation over on default of such appointment; and so far as by the terms of such provision the execution of the power was left to the judgment or discretion of the trustees, it was ex-

¹ R. S., § 99.

² *Id.*, § 97.

³ *Id.*, § 100.

⁴ *Swift v. Gregson*, 1 T. R., 432.

⁵ 1 *Perry on Trusts*, § 250; *Walsh v. Wallinger*, 2 Russ. & Myl., 78; *Lambert v. Thwaites*, L. R., 2 Eq., 151.

⁶ *Davidson v. Proctor*, 19 L. J., N. S., 395; 14 Jur., 31; *Pearce v. Vincent*, 2 Myl. & K., 800; 2 Bing. N. C., 328; 2 Keen, 230; *Goldring v. Inwood*, 3 Giff., 139.

⁷ 2 *Perry on Trusts*, § 508; *Brown v. Higgs*, 8 Ves., 561.

pressly made to depend on their will within the meaning of the statute. And, as before remarked, the apparent purpose and effect of this provision were not qualified or defeated by the fact that the ultimate limitation was to objects so indefinite as to render it ineffectual. In practical effect it was the same as if the fund had been limited over to the heirs and next of kin of the testator, as they necessarily would take in default of the execution of the power.

In *Power v. Cassidy*, 79 N. Y., 602, the fund was bequeathed to the executors with power of appointment and selection among a designated class of beneficiaries. While the manner of executing it was discretionary, the trust or trust power was imperative, and, on default of the executors to execute it, the power would survive them, and the designated objects would then, and ultimately, be entitled to share equally in the fund, and it would be enforced accordingly. But as to those beneficiaries, it would not, in that sense, and for that purpose, have been imperative, if there had been a limitation over to other objects on such default, although, as to the latter, it would have retained its imperative character. Yet the power thus given of appointment would have been valid, and may have been effectually executed.

It is essential to the constitution of a valid trust, or special power in trust, by a testator, that the objects be so designated or described that they may be definitely known or ascertained from the provisions of his will. And it was the failure of the testator to so designate or define the objects of the attempted trusts which came to the attention of the Court, and were, for that reason, held invalid.¹ In those cases the trust power sought to be given was that of appointment and selection without limitation over. The infirmity which rendered invalid the provisions of the wills in question in those cases was, that no beneficiary was designated or pointed out by, or ascertainable from, the will, having any interest in the execution, of the power, or whc

¹ *Prichard v. Thompson*, 95 N. Y., 76; *Holland v. Alcock*, 108 *id.*, 312; *Read v. Williams*, 125 N. Y., 560.

could assert in court any claim founded upon the trust. Those provisions of the wills were, therefore, held invalid for indefiniteness of the classes of objects of the trusts sought to be created. And in this respect they were distinguished from *Power v. Cassidy*. The present case is distinguishable from them in like manner, and further, that the power given by the primary provision in question was not that of appointment and selection among members of a class, but was of appointment and disposition to a definitely designated beneficiary. It is also essential that the subject of the power be designated and certain, or that the means be provided by the will to render it properly ascertainable or certain. The provision of the power in that respect is for the application to the Tilden Trust of the residue of the estate, or so much of it as the trustees should deem expedient. The cases before cited, recognizing as effectual discretionary power given to trustees to regulate, control or determine the amount which certain beneficiaries should receive of specific funds, to be exercised in reference to circumstances which the donors of the power had in view, have some bearing upon this question. Those are the *Hawley*, *Mason*, *Costabadie*, *French*, *Walker* and *Cole* cases, *supra*.

The residuary estate was a definite fund; and unless the trustees determined that it was inexpedient to endow the Tilden Trust, they were at liberty to apply to it the entire fund; but whether expedient to so apply all, or less than the whole of it, was a matter of judgment of the trustees to be founded upon the amount of the residue in reference to the sum suitably available for the purpose of the institution, and that was the amount the testator authorized the trustees to appoint to the institution. This was the means provided by the will to make certain that which, until such action by the trustees, was uncertain.

In *Peck v. Halsey*,¹ it was held that a bequest by the testatrix of *some* of her best linen to A. was void for uncertainty, but that a bequest of *such* of her best linen as the executor should think fit, or as the legatee should choose, would have been good.

¹ 2 P. Wms., 389.

In *Kennedy v. Kennedy*,¹ the testator gave all his household furniture, etc., to trustees, and directed that all his household property be sold by them except such articles as his wife should desire to retain, and which he authorized her to appropriate to her own use. Held, that the power of selection was effectually given to the wife. And *Arthur v. MacKinnon*² is to the same effect. It has been seen by reference to the statute that the power of appropriation of a fund among the members of a class may be created, and the donee of the power be authorized, in his discretion, to appropriate it in such proportions as he may please. This was so at common law. When the fund is definitely designated, it would seem that power may be conferred upon the donee of the power to determine what portion of it may be appointed to a definite beneficiary designated by the donor.

Our attention has been called to no authority to the contrary of that proposition in its application to the present case. The *Prichard*, *Holland* and *Read* cases do not have any necessary application to the question. The reasoning there was had in reference to their contexts, to which it was very apt. And the relief of the provision relating to the *Tilden Trust* from the alternative ulterior provision, which embraces only indefinite objects, denies to those cases any practical application to the questions presented in the case at bar.

While the statute abolished powers as they before then existed,³ it, as said by Judge ANDREWS in *Read v. Williams*, "does not define all the purposes for which a power over property may be created." This appears by § 74, before referred to, and by the reviser's notes,⁴ as to powers other than those which are designated as beneficial. They, except as there enumerated, were abrogated by the statute.⁵ Treating that in question as a trust power, those considerations of the statute may not be essentially important here. It must be assumed that the testator, through powers con-

¹ 10 Hare, 438.

² L. R., 11 Ch. Div., 385.

³ 1 R. S., 732, § 73.

⁴ 3 R. S., 2d ed. 590.

⁵ 1 R. S., 733, § 92.

ferred on his trustees by the thirty-fifth article, intended to dispose of his entire residuary estate, and, therefore, its ultimate dispositional provision (in view of article thirty-nine) was intended, as by its terms it purported to be imperative; but that character was not unconditionally applicable to the power of appointment and disposition in the primary provision relating to the Tilden Trust. It had relation to the limitation over to the objects of the ulterior provision, and, in consequence of the invalidity of the latter, his intention, if the trustees had failed to appoint the Tilden Trust as the beneficiary, would have been disappointed. The purpose of the appointment and disposition to that institution is apparently legal, and, at common law, may have lawfully been accomplished through the execution of a power in the manner the testator sought by his will to do it. It also fairly comes within the purposes for which a power, as defined by the statute, may be employed.¹ At common law, a trust may have been attended with a discretionary power, upon the non-execution of which the enforceable character of its ultimate limitation might be dependent. This relation of powers to which trusts may have been subjected was preserved and provided for by the statute. And, while a trust power is in its nature imperative, that character of it in the sense of being enforceable may, when its execution or non-execution is made expressly to depend upon the will of the donee, be suspended by and during the existence of such discretionary power or determined by its execution.

In the present case, there was involved in the provision for the Tilden Trust a power in its terms discretionary; and, so far as it was so, its execution or non-execution was made expressly to depend on the will of the trustees; and, the purpose being lawful, it was valid, unless in contravention of the statute against perpetuities. It is urged that the limitation, provided for by the thirty-fifth article of the will, would permit the unlawful suspension of the absolute power of alienation of the realty and of the absolute ownership of the personal property constituting the resid-

¹ R.S., § 74.

uary estate of the testator.¹ This would be so, and its effect the invalidity of the limitation, if such suspension would not, by the terms of the will, necessarily terminate within a period not longer than the continuance of the life of the survivor of the two persons there designated.² But the thirty-fifth article must be construed in connection with the thirty-ninth article, and, by the latter, the testator directed that the executors and trustees "possess, hold, manage and take care" of the residuary estate during a period not exceeding such two lives. This, in view of the further direction that they apply such estate to the objects and purposes mentioned in the will, which was imperative, is not consistent with the suspension of the absolute power of alienation of the real estate, and of the absolute ownership of the personal property beyond that period. It, therefore, seems that the future estates sought to be created by the testator were so limited that, by the terms of those provisions, they would necessarily, and beyond any contingency, have terminated within the period prescribed for that purpose by the statute, and in that respect they may be upheld.

These views lead to the conclusion that the provisions of the will relating to the Tilden Trust and the powers for their execution given to the executors and trustees were valid, and, as the consequence, the main purpose of the action must fail.

Since the commencement of the action, and upon the application of the executors and trustees, a Tilden Trust has been incorporated in form and manner satisfactory to them, and organized. They determined to endow it with the entire residuary estate, and made to the institution conveyance and transfer accordingly, subject to provisions contingently made in the will by the testator in behalf of special trusts by him created, and as there directed.

It is insisted that the act of incorporation is not such as was intended by the testator, in that it was not given the corporate capacity designed by him, and for the further

¹ 1 R. S., 723, § 15; *id.*, 773, § 1.

² Schettler *v.* Smith, 41 N. Y., 328.

reason that it designated the executors and testamentary trustees as permanent trustees of the institution. By the will he requested them to obtain "an act of incorporation of an institution to be known as the Tilden Trust, with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and in case said institution be incorporated . . . I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof," etc. In the preamble of the act of incorporation, it is stated that the "executors and trustees deem it inexpedient to designate any purposes of the corporation . . . other than the establishment and maintenance of a free library and reading-room in the city of New York in accordance with the purpose and intention of the said testator," and such was the capacity given by the act to the corporation. The first section provided that the three persons (naming them) who were the executors and trustees, and such other persons as they shall associate with themselves, and their successors, were created a body corporate under the name and title of the Tilden Trust; and by the second section it was provided that those three persons should be permanent trustees of such corporation; and that they designate and appoint other trustees, so that the number should not be less than five.

The testator seems to have had in view only one definite purpose of the corporation. That he expressed. Beyond the establishment and maintenance of a free library and reading-room, he contemplated that the promotion of some further scientific and educational object might suitably and properly be added and sustained. He, therefore, provided that the corporate capacity be adapted to such objects in that respect as the executors and trustees should designate.

This, however, would be dependent upon circumstances to be determined by them, and he left it to their

discretion. He evidently did not intend that the corporation for the purpose by him definitely appointed should be frustrated by the failure of the executors and trustees to exercise their discretion in such a manner as to give occasion to amplify the corporate capacity of the institution. The question whether, after creation of the corporation for the free library and reading-room, the executors and trustees may, by the designation of such further objects, authorize the enlargement of its capacity accordingly, does not now arise and is not considered.

We think the incorporation was not invalidated by the manner the capacity of the institution was defined in the act. No power seems to have been given by the will for designation and creation by legislative act of three permanent trustees of the corporation. It may be that the testator intended, and he very likely did expect, that the executors and trustees of the will should become trustees of the institution, and this may have been accomplished in the way he provided. But it is seen that the manner provided for the selection of the first trustees of the institution, in the event it should be incorporated, was such that they were to be designated by his executors and trustees. The provision made by him for the organization in that respect of the institution was not observed or adopted in the act of its incorporation. Further than this, the question which may arise upon that situation requires and has here no consideration.

When the plaintiff commenced this action, it may have had support in the invalidity of the ulterior provision of the thirty-fifth article of the will to prevent the application of any portion of the estate to the indefinite objects and purposes there mentioned. But as the executors and trustees afterward made a determination which would prevent the application of any part of the fund to those objects and purposes, no relief in that respect is now essential; and the only purpose for which further consideration need be given to that subject has relation to the question of costs, which, we think, should, on behalf of the several parties, be chargeable to the estate of the testator. The judgments

of the Court below should, therefore, be reversed and the complaint dismissed, with costs in that and this Court to all the parties, appellants and respondents, payable out of the estate.

Judgment affirmed, with costs payable to all parties out of the estate.

FOLLETT, Ch. J., HAIGHT and PARKER, JJ., concur with BROWN, J.; BRADLEY, J., reads dissenting opinion, and POTTER and VANN, JJ., concur therewith.

The object of this note is to point out as briefly as possible how far the principal case is of authority outside of the State of New York. That the decision was somewhat of a surprise to the profession, and has been regarded as of more interest and importance than it merits, would seem clear from a careful examination of the principles upon which the opinion of the majority of the Court proceeded. Succinctly stated, the ground upon which the case was decided was that the gift to the Tilden Trust, and the gift to such charitable, educational and scientific purposes as in the judgment of the trustees and executors would be most wisely and substantially beneficial to the interests of mankind, constituted, in effect, but one provision; because, before conveying the residue to the Tilden Trust, the executors and trustees would be bound to compare the relative merits or expediency of this charity with other general charitable, educational and scientific purposes, and as a bequest to general charitable purposes was void for uncertainty, both provisions of the thirty-fifth article of the will fell together.

With the mere question of construction, the practitioner outside of the State of New York is not

interested. What concerns him is not the propriety or impropriety of the particular decision, but the precise ground upon which the bequest to general charitable purposes was held void, with a view to determine how far the decision is of persuasive authority upon the validity of a similar gift in his own State. Uncertainty in the objects of a charitable gift has long been regarded as one of its essential characteristics. As was well said by Mr. Binney in his great argument in *Vidal v. Girard's Executors*, 2 How., 149: "Uncertainty is indispensable to all charities. If any one has a right to claim by law, it ceases to be a charity." Thus a bequest to trustees to be applied by them "according to their discretion for the advancement and propagation of education all over the world," was held by the House of Lords a valid charitable bequest, and not void for uncertainty: *Wicker v. Hume*, 7 H. L. C., 124. So a gift of residue to found at Washington, under the name of the Smithsonian Institute, an establishment for the increase and diffusion of knowledge among men, was sustained by Lord LANGDALE on the ground that knowledge must mean sound and useful knowledge, and anything for the benefit, advancement and propagation of

that was for the advantage of mankind: *President of the United States v. Drummond*, 7 H. L. C., 140. So a gift of residue to be distributed among the "worthy poor" of a certain city, *Hunt v. Fowler* (Ill.), 12 N. E. Rep., 331; or to a certain town for its "worthy and unfortunate poor," *Dascomb v. Marston* (Maine), 3 Atl. Rep., 888; or to "aid indigent young men" of a certain town "in fitting themselves for the evangelical ministry," *Trustees v. Whitney* (Conn.), 8 Atl. Rep., 141; or to an incorporated parish for its poor, although there be no poor in the parish at the time of the testator's death, *Appeal of Goodrich* (Conn.), 18 Atl. Rep., 49; or a discretion to testator's sisters to apply the income from a certain fund to the relief "of the poor and unfortunate whom we have aided in past years, and also to others whom their judgments may dictate strictly for private charities, has been sustained: *Bullard v. Chandler* (Mass.), 21 N. E. Rep., 951. Other instances might be multiplied almost indefinitely. Hence, in the case of a will making a charitable bequest, it may be laid down, as a general principle, that it is immaterial how vague, indefinite and uncertain the objects of the testator's bounty may be, provided there is (1) a discretionary power vested in some one over its application to those objects: *STRONG, J.*, in *Domestic and Foreign Missionary Society's Appeal*, 30 Pa., 425, 435; *Cresson's Appeal*, 30 Pa., 450; *Norcross' Adm's v. Murphy's Executors*, 14 (N. J.) Atl. Rep., 903; and, (2), provided there is a clear intent to give to what are technically known and recognized as charitable purposes as distinguished from mere schemes of

general or indefinite benevolence. Where the bequest is for charitable purposes and also for purposes of an indefinite nature not charitable, and no apportionment of the bequest is made by the will, so that the whole might be applied for either purpose, the whole bequest is void: *Jarman on Wills*, 5th ed., 214.

"If there be any option in the trustee to apply the funds to purposes which, though liberal or benevolent, are not such as in this Court are understood to be charitable, the trusts cannot be executed here:" *LORD LANGDALE* in *Nash v. Morley*, 5 Beav., 177-183. See *Harris v. DuPasquier*, 26 L. T. N. S., 689; *Fowler v. Gailike*, Russ. & Myl. 1, 232; *Jarman's Est.*, 8 Ch. D. 584; *Norris v. Thompson*, 4 C. E. Green, 307, 5 C. E. Green, 489; *Kendall v. Granger*, 5 Beav., 302; *Ommany v. Butcher, Turn & Rus.*, 260; *Nixhols v. Allen*, 130 (Mass.), 211.

Now on examination it will be seen that the trust contained in the thirty-fifth article of Mr. Tilden's will fulfil both requisites perfectly; not only are the objects for which the disbursement is to be made distinctly charitable in the technical sense, as distinguished from objects of mere benevolence or liberality, but the power of disbursement and selection is distinctly conferred upon the executors and trustees. In England or Pennsylvania there would seem to be no reason whatever to doubt that such a trust would be sustained. Its terms are almost identical with those in *Whicker v. Hume*, *supra*, sustained by the House of Lords. Unless, therefore, the decision in the principal case depends upon

principles peculiar to the State of New York, it is at variance with the whole tenor of authority. If it does depend upon principles peculiar to that State, its value can then only be determined by tracing the principles governing the decision to their source, and ascertaining how far they are of general application. Now, the ground upon which the decision is placed is thus stated by Justice BROWN, in delivering the opinion of the majority of the Court :

"The law is settled in this State that a certain designated beneficiary is essential to the creation of a valid trust." The remark of Judge WRIGHT, in *Levy v. Levy*, 33 N. Y., 107, that if there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust without a certain beneficiary who can claim its enforcement is void, has been repeated and reiterated by recent decisions of this Court: *Richard v. Thompson*, 95 N. Y., 76; *Holland v. Alcock*, 108 *id.*, 312; 14 N. Y. State Rep., 761; *Read v. Williams*, 125 N. Y., 560; 35 N. Y. State Rep., 909; and the objection is not obviated by the existence of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the Court can ascertain who were the objects of the power." The equitable rule that prevailed in the English Court of Chancery, known as the *cy pres* doctrine, and which was applied to uphold gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of this State: *Holmes v. Mead*, 52

N. Y., 332; *Holland v. Alcock*, *supra*. If the Tilden Trust is but one of the beneficiaries which the trustees may select as an object of the testator's bounty, then it is clear and conceded by the appellants that the power conferred by the will upon the executors is void for indefiniteness and uncertainty in its objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of this State, or of the United States, but embraces the whole world. Nothing could be more indefinite or uncertain, and broader and more unlimited power could not be conferred than to apply the estate to "such charitable, educational and scientific purposes as, in the judgment of my executors, will render said residue of my property most widely and substantially beneficial to mankind."

The decision, it should be observed, does not, as has been some time supposed, in any way touch the question of discretionary powers, the validity of which was expressly recognized. The limitation in the principal case, however, could not be so sustained because the testator manifestly intended that, while the executors and trustees should exercise their discretion in deciding what peculiar form of charity would be most beneficial to mankind, they should not, under any circumstances, allow the property to pass to the heirs and next of kin by reason of the non-exercise of power. If, therefore, the limitation be regarded as creating only a power, the power was in trust, and as such required the same certainty as in the case of a trust.

The underlying principle upon which the decision turns is well

expressed in the opinion of Judge WRIGHT in *Levy v. Levy*, 33 N. Y., 107: "A trust without a certain beneficiary who can claim its enforcement is void." In England and such of the States as recognize the statute of charitable uses, 43 Eliz., or the equitable principles applied in chancery in regard to such trusts, the uncertainty in the objects of a trust for charitable uses does not affect its validity, provided a discretion be lodged somewhere over the application of the fund, since in such case a Court of Chancery has jurisdiction to see to its enforcement. In New York this jurisdiction does not exist, and hence such trusts are incapable of enforcement and void. The reason for this given in the principal case is, that "the equitable rule that prevailed in the English Court of Chancery, known as the *cy pres* doctrine, and which was applied to uphold gifts for charitable purposes where no beneficiary was named, has no place in the jurisprudence of this State." Citing *Holmes v. Mead*, 52 N. Y., 322; *Holland v. Alcock*, 108 N. Y., 312. But this statement seems somewhat inaccurate. The jurisdiction of the Court of Chancery over charities was not derived from the *cy pres* doctrine. That doctrine was derived from the prerogative jurisdiction, and merely enabled the Court of Chancery, where the testator's scheme had failed or become impracticable, to frame an analogous scheme in accord with his presumed intention, whereas the ordinary jurisdiction over charities enabled the Court to sustain bequests for charitable purposes which would have been void for uncertainty in other cases.

Whether this latter jurisdiction is derived from the prerogative or from the extraordinary equitable jurisdiction of the Court, seems to be a question upon which there is much difference of opinion. The former view would place the jurisdiction upon the same plane as in the case of idiots and lunatics, and is to be preferred on principle: *Story, Eq. Jur.*, § 1188; *Taney, C. J.*, in *Fountain v. Ravenal*, 17 How., 397-398. The latter view is, however, more generally accepted in the United States: *Fountain v. Ravenal*, 17 How., 382-398; *Witman v. Lex*, 17 *Story & R.*, 90; *Webster v. Morris* (Wis.), 28 N. W. Rep., 363. See *Bridges v. Pleasants*, 4 Ire. Eq., 26; *Fantiet v. Lawson*, 50 Conn., 501. This distinction may be of importance, for although the prerogative jurisdiction resides in the people of the States—*TANEY, C. J.* in *Fountain v. Ravenal*, 17 How., 395—in many States the courts possess only strictly judicial powers: *Webster v. Morris*, 28 N. W. Rep., 363. In others the *Cypres* Doctrine is not adopted; and if the jurisdiction over charities is a branch of that doctrine, such bequests could not be sustained: *Witman v. Lex*, 17 *Serg. & R.*, 90.

The system of charitable uses as recognized in England prior to the Revolution has ceased to exist in New York. This follows from the provisions of the Revised Statutes, Sec. No. 45, 1. R. S., 727, abolishing all uses and trusts, except in certain specified cases, from the repeal of statute of 43 Eliz., c. 4, in 1788, at a time when both the bench and bar were of opinion that the statute was the only source of the jurisdiction of chancery in

the case of trusts for charitable uses, and from the growth of a system of incorporated charities, established by a series of acts of Assembly, by virtue of which a valid bequest to charity can only be made through the instrumentality of a corporate body, subject to supervision and visitation by the proper authorities. Such a body is itself a completely equipped scheme created by the legislature, and has power for ever to carry out its purposes and to ascertain and designate the individuals who are to receive the benefit of the charity.

Whatever property it takes it receives not, in legal contemplation, as trustees, but absolutely, holding both the legal and equitable titles; and no question of indefiniteness, or uncertainty in the beneficiary, can ever arise upon a conveyance to such a body. It is precisely like a conveyance in fee to a natural person by name: *Levy v. Levy*, 33 N. Y., 97; *Bascom v. Albertson*, 24 N. Y., 584.

"Under this system many doubtful and conflicting questions disappear in the more simple inquiry whether the grantor or divisor of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift." *RAPALLO, J.*, in *Holland v. Alcock*, 108 N. Y., 312.

"Thus the system is harmonious and symmetrical; but if it is to be regarded as not intended to express the entire will of the State on the subject of charities, and we are to assume the existence and validity of charitable uses, outside of the legislative sanction through corporate charters, State legislation and policy, from the origin of the government, are strikingly incon-

sistent and absurd. We have repealed all statutes that support, maintain and restrict indefinite uses. We have enacted none defining what, in a legal sense, are charities. We have a clear and well-defined mortmain policy restraining and limiting gifts to corporate charities, which are approved in their principle and design by the legislature, while indefinite and perpetual uses, created without any sanction in respect to their object or otherwise, are freed from all restraint. We have adopted a mortmain policy applicable to corporations only; one essentially useless and nugatory, if gifts to unincorporated bodies, without any restraint whatever, were to be tolerated. We have restricted gifts by will to charitable corporations, in certain cases, to one-fourth of the testator's estate, and declared invalid any gift to them by will, unless the will be executed at least two months before the testator's death; but there is no positive law restricting devises or bequests to charitable or indefinite uses, or protecting against improvident wills, where a corporation is not the donee." *WRIGHT, J.*, in *Levy v. Levy*, 33 N. Y., 97.

Hence it seems clear that, inasmuch as the decision in the principal case depends upon principles peculiar to the law of New York, deduced from the peculiar provisions of its statute law, it is not of authority in any State in which the statute of uses is in force, or in any State in which its principles have been recognized in the administration of charitable bequests, even though the statute itself be not in force. Thus in Pennsylvania the principal case would not be of authority, since although

the statute of uses is not in force, its principles have been recognized: *Vidal v. Girard's Ex.*, *supra*. Otherwise, in Maryland, since in that State it has been expressly held that the statute is not in force, and that independently of the statute, a Court of Chancery, cannot sustain and enforce a devise to charitable uses which, if not to a charity, would on general principles be void: *Dashiel v. Attorney-General*, 5 H. & J., 392; *Naught v. Getzendalker*, 5 Alt. Rep., 471.

On the other hand in Connecticut it has been held that a bequest to general charitable purposes is void, although the statute of uses has been in part recognized in that State. Hence, a bequest of a fund for such charitable purposes as A. B. may deem proper is void. "Whatever might be held on this question by the courts of England, or of those States which have adopted the English doctrine on the subject, it is very clear that under our own decisions, which have established a definite rule on the subject in this State, this bequest cannot be held valid. It is well established with us that a gift to a charitable use must designate the particular charitable use by making the gift to some charitable corporation whose charter provides for a charitable use of its funds, or to some particular object or purpose that the law recognizes as charitable. It is enough if the object be mentioned, and the law can see that it is a charitable one; but it is not enough that the gift be merely 'to charitable uses,' or 'to be used in charity,' so long as no selection is made from the long list of recognized charitable objects. And it is not enough that some person is named to whom is given the power

of naming the charity. That is the testator's own matter. It is his intent that is to determine that. If he chooses to leave the matter wholly to the discretion of some person named, he can do so by making the gift to him, leaving him to use his discretion as to the disposition of it. In this case the donee takes absolutely, and the law does not trouble itself as to whether he acts conscientiously in the matter. The testator has chosen to leave the matter to uncertainty, and there the law leaves it. The charitable object, thus required to be named, may be a benefit to a class of persons, and therefore uncertain as to the particular persons of the class that are to receive the benefit. This uncertainty may make the bequest void, unless there is a power given to some person or corporation to make a selection of the individuals: "*White v. Fisk*, 22 Conn., 50; *Adey v. Smith*, 44 Conn., 70; *Fairfield v. Lawson*, 50 Conn., 513; *Coit v. Comstock*, 51 Conn., 379; *Tappan's Appeal*, 52 Conn., 412. Here the power given the widow is not to select the particular beneficiaries of a class named, but to select the charity itself: *Bristol v. Bristol*, 5 Atl. Rep., 691, 692. See also other decisions: *Bridges v. Pleasants*, 4 Ire. Eq., 26, 30; *Webster v. Morris*, 28 (Wis.), N. W. Rep., 363; *Hoffen's Est.*, 36 (Wis.), N. W. Rep., 363. In States, therefore, in which the statute of charitable uses is thus far in force, it would seem that the principles of the decision in *Tilden v. Green* would apply to bequests for general "charitable purposes," though not to cases in which the testator had specified the particular kind of charity to be benefited: *Howard v. Page*.

BOOK REVIEWS.

By G. W. P.

CONSTITUTIONAL LEGISLATION IN THE UNITED STATES.—ITS ORIGIN AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS AND OF STATE LEGISLATURES. By JOHN ORDRONAU, LL.D., Professor in the Law School of Columbia College. Philadelphia: T. & J. W. Johnson & Co., 1891.

“The government of forty-four independent States, dwelling in harmonious relations under a supervisory Federal sovereignty, would seem to justify the treatment of legislation as a department of jurisprudence meriting more textual consideration than it has yet received.” Such is the reason which, in his preface, Professor Ordronau assigns for the preparation of this valuable addition to the literature of American Constitutional Law. The object of the work is to present in a concrete form the entire system of Federal and State legislation, and its scope includes an exposition of “those administrative powers which, in our dual form of representative government, are sovereign within their several spheres of action.”

This statement leads the reader to expect a volume of unusual interest and importance, and it may be said with confidence that all thoughtful readers of this work will find their expectations to a great extent realized, although there will be a certain admixture of disappointment. Portions of the subject are treated with marked ability, and there is in the author's style that dignified tone and that pleasing, partially-subdued eloquence which seems to come like an inspiration to our best writers on constitutional law. Whether it is that, as just suggested, the subject is itself inspiring, or whether it is that the paramount importance of the subject attracts the attention of men of the first rank, it is, nevertheless, a fact that the nationalist expounders of the Constitution of the United States, both on the bench and at the bar, express themselves with an impressiveness quite unknown in other departments of legal literature. By their tempered enthusiasm they stimulate

the patriotism of the reader, and by the earnestness of their arguments they carry conviction to his mind. Modern writers exhibit this characteristic as well as those who, like Hamilton and Marshall, were busied in rearing the structure which is now complete. Every reader of Judge Hare's great work on Constitutional Law will recognize the truth of this remark, and it is most gratifying to find that Professor Ordronaux's book is not lacking in this respect.

The development of the author's subject may be traced by means of his chapter-titles, a list of which is, indeed, the only table of contents with which the book is provided. The first two hundred pages are occupied with an exposition of the fundamental principles and historical facts which lie at the basis of English and American constitutional law. The opening chapter is entitled, "Sources of Representative Government in the United States." It contains little that is new or original, but it is a thoughtful and well-written chapter, and does full justice to its subject. The author finds in the Revolution of 1688 the completion of "the edifice of free government," and he traces thence the inspiration of the American colonists and the initial links in that chain of events which "wrought out, as a stupendous conclusion, a union of sovereign States based upon a Constitution ratified by the entire people." The foundations of all governments are shown to rest either upon the traditions of *dogma* or upon the doctrine of *convention*, and it is the convention, or primary assembly of the people—the first expression of their organized sovereignty—which is, in our American nation, the supreme law-making body. "In such a nation," says Professor Ordronaux (p. 14), "the status of political subject, or his classification in any form, is unknown because inapplicable, and the word citizen takes its place, with all the powers, privileges and immunities which the law of the land accords to such a person." All legislative power in the United States is, accordingly, said to exist in two forms, (1) as political or sovereign power, the nation as a whole embodying the political sovereignty, supreme and unlimited.

(2) As civil or delegated power, the legislature representing the legal sovereignty as bounded by constitutional limitations. Hence, political legislation belongs exclusively to the people as a nation, while civil legislation belongs to the legislature proper and, indirectly, to the judiciary in the exercise of their supervisory power. The second chapter is an interesting essay on "The Organization and Development of Representative Government in the United States." The author gives the sanction of his name to the view that the federative union of Hartford, Wethersfield and Windsor furnishes us with the first example of an American constitution of government based upon the sovereignty of the people. It need hardly be said that the historical basis of this view may be considered as open to question, and we understand that a different position will be assumed by an eminent authority in a work soon to be published.

Professor Ordronaux passes in review the Mayflower compact, the Plymouth Declaration of 1635 ("the first exercise of the principle of Home Rule on this continent"), and the events which culminated in the Articles of Confederation, "the office of which," says Mr. Curtis, "was to demonstrate to the American people the practicability of a more perfect Union." The author then examines the principles of representative government, and investigates the claim of independent sovereignty made on behalf of the States. His conclusion will not remain in doubt when the following passage is perused: "We have now sufficiently examined this question of independent sovereignty as formerly claimed for the States. We have seen that it never had any juristic existence, and, moreover, was never claimed by them in the international sense, the only true test of political independence; and if this is once established in relation to the thirteen original States, how much less tenable must such a proposition be when sought to be applied to the thirty-one new States admitted since the foundation of the Constitution. Whence did such States, for example, as Florida, or Louisiana, or Arkansas, or any of the other States formed out of the territory of the

Nation, and whose very soil was purchased by the money of the people of the United States, obtain their original sovereignty? Strange as it may seem now, it required something more than the arguments of the Senate Chamber, or the decisions of Federal Courts, to lay this doctrine at rest. The arbitrament of civil war and the pitiless logic of the battle-field, *ultima ratio regum*, were finally invoked in its behalf ere this dogma was surrendered. It perished amid the clash of arms and the bitter throes of fratricidal strife, a stupendous monument of political folly and unreasoning ambition."

In Chapter III, on "The State as a Qualified Sovereignty within the Union," the nature and origin of the State is discussed from the point of view of modern political philosophy, and space is given to a tabulated statement of Bluntschli's distinctions between the ancient and the modern state. The author then summarizes, in the light of judicial decisions, the nature of the States within our Union, their formation and relation to one another. Chapter IV—"Constitutional Guarantees as Elements of Civil Liberty and Federal Unity"—completes what is really a 200-page introduction to the subject of the book as indicated in title and preface. This fourth chapter comprises a review of Magna Charta, The Petition of Right, The Habeas Corpus Acts and of the leading cases in English constitutional law, classified under "The Powers of the Crown," "The Powers of Parliament," and "The Powers of the Judiciary."

"We are now prepared to enter," says Professor Ordronaux (p. 202), "upon an examination of the constitutional jurisprudence of the United States so far, and so far only, as it affects the functions of legislation." Then follows an orderly enumeration of the restraints upon the National Government and upon the States, contained in the original Constitution and in the Amendments, with an outline statement of the judicial interpretation of these restrictive provisions. In this chapter and in the ninth, which is a survey of the powers of Congress under the title, "Congressional Legislation," there is presented to the reader a summary of our constitutional law.

But in setting out to write such a summary, Professor Ordronaux has undertaken a (to use a favorite word of his) "stupendous" task. To write a sketch of our constitutional law requires the learning of a Cooley, and Professor Ordronaux would doubtless be the first to acknowledge that, as yet, the advantage, in this respect, is with the older man. Indeed, it may be said that the learning or ability of the author, as exhibited in his preliminary exposition, appears more considerable than it does when judged by the contents of the fifth chapter and of the ninth. In the first place, it is to be regretted that the author has treated of the restraints and checks upon Congress before discussing the positive power of Congress as outlined in the ninth chapter. As the chapters stand, the natural development of the subject is reversed. Then, too, the author has altogether omitted to enlarge upon that which has grown to be an integral part of the modern constitutional law—the positive power of the States to legislate. A conception of constitutional law which gives prominence only to the restraints upon the States is an imperfect conception. We expect a modern writer to recognize the fact that the Supreme Court has not rested content with enunciating the principle that the States are the residuary legatees of legislative power. The Court, in many important decisions, has established what the States *can* do as well as what they cannot. There should, in short, be a chapter on "State Legislation," and this, together with the ninth chapter, should precede the fifth.

Again, it should seem that the author is not as familiar as we have a right to expect him to be with the decisions of the Supreme Court, or, at least, that he does not know their relation to one another. His treatment of many of the most important questions may be said fairly to be inadequate. One illustration may be found in the discussion of interstate commerce, on page 462, *et seq.* We note the following passage: "The right of interstate traffic must, of necessity, include the right of bringing goods into a State. 'If this power,' says C. J. MARSHALL, in *Brown v. Maryland*, 'reaches the interior of a State, and may

then be exercised, it must be capable of authorizing the sale of these articles which it introduces. Commerce is intercourse ; one of its most ordinary ingredients is traffic. Congress has a right not only to authorize importation, but to authorize the importer to sell. It may be proper to add, that we suppose the principles laid down in this case apply equally to importations from a sister State.' So long, then, as the articles imported (from whatever source they may come, whether from abroad or from sister States) remain in the original form in which they were brought into the State, they are subject to the power exclusively vested in Congress, and are not within the jurisdiction of the police power of the State, unless placed there by Congressional action " (page 468).

But, surely, Professor Ordrónaux knows that *Brown v. Maryland* involved a question only of importation from abroad, and that subsequently, in *Woodruff v. Parham* (8 Wall., 123), the Court decided in opposition to the *dictum* in *Brown v. Maryland*, that the term "imports" does *not* apply to commodities brought from sister States. In fact, this decision is referred to in another connection (page 317), so that the omission to mention it here must be regarded as an oversight. But the omission is unfortunate, as the reader is liable to be misled as to the true foundation of an important doctrine. It is unfortunate, too, that the author has failed to trace the waxing and the waning of the theory that the validity or invalidity of a tax in relation to interstate commerce depends upon the absence or presence of the element of discrimination.

Again, it is a matter of surprise that the author should, under the heading "Concurrent Powers with the States," mention the power "to establish a uniform rule of naturalization." This, of course, is not a concurrent power, but one which Congress alone can exercise. The thought which the author seems to have in his mind is that, in spite of the XIVth and XVth Amendments, the States still retain the right of prescribing conditions and annexing limitations to the exercise of the elective franchise by their citizens (page 524). But the form of statement is mislead-

ing, and the substance of it could be better treated as a positive power of the State on the lines suggested above.

A criticism of the form of a book is generally unsatisfactory, so diverse are opinions in regard to the value of "externals." But we feel that this notice would be incomplete if it failed to call attention to the curious mode adopted by the author of indicating divisions of the subject. For example, in the chapter on "Constitutional Jurisprudence," a subdivision is headed with the words "Additional Restraints upon the National Government Contained in the Amendments to the Constitution," printed in type larger than the chapter-heading. Following this come paragraphs headed in type of the same size, as follows: "Religious Freedom, Freedom of Speech, The Right to Assemble Peaceably and to Petition, Telegraphic Communications (!), Capital or Infamous Crimes, Land and Naval Forces, Twice put in Jeopardy (a subject which is treated in eighteen lines), Not Compelled to be a Witness Against Oneself, nor Deprived of Life, Liberty or Property without Due Process of Law, Private Property not to be Taken for Public Use without Just Compensation." This list of headings will be seen to be composed partly of extracts from the language of some of the Amendments, partly of catch-words referring to Amendments, and partly (as in the case of "Telegraphic Communications" and "Land and Naval Forces") of titles which, at first sight, have nothing to do with Amendments. A closer examination shows that the author is discussing the relation of the IVth Amendment to telegraphic communications, and that the exceptions in the Amendment of cases arising in the land and naval forces is made the occasion of stating (still, it will be remembered, under the head of *restraints* on Congress) that Congress is *not* restrained from punishing offences in those branches of the public service without indictment. The VIth, VIIth, VIIIth, IXth and Xth Amendments are referred to without separate headings, and then (in the same type as those above noticed) comes the title "Restraints upon the States." Under this head the subdivis-

ions are printed in italics until (under the caption "*Laws Impairing the Obligation of Contract*") we find a subdivision of a subdivision set forth in large type again as follows: "State Insolvent Laws in their Relation to the Obligation of Contracts." Then follows this extraordinary heading, "Third, As to Interstate Commerce." As there has been no "First" and no "Second," the reader is at a loss to know the significance of this caption. The author, in preparing his work, was doubtless so absorbed in his subject that he overlooked these matters of arrangement. But they are not trifles, but matters of importance, and a book which disregards them runs the risk of being called "slovenly." Thus, the seventh chapter is entitled "Judicial Legislation, including Impeachment," but it is silent on the subject of impeachment, which is, however, treated of in the eighth chapter under the special title "Impeachment."

One of the most interesting and instructive parts of the book is the sixth chapter, on "The Legislature in its Relations to Administrative Law." The historical differentiation of the legislative, executive and judicial branches of government is traced, and the necessary supremacy of the first is demonstrated—subject, of course, in the United States, to the limitations imposed by the Constitution. This is followed by an interesting exposition of the respective powers and duties of the executive and legislative departments of the several States. The chapter will be found especially useful by those for whom in particular the book is written—for those who desire (in the words of the preface) "to practice or interpret the canons of representative government in the United States." The same remark applies to the closing chapter on "The Mechanics of Legislation." It is far from our purpose to underestimate the value of the work to such men or to readers at large. It is thoughtful, well written and of unusual interest. Even if more competent critics should give real value to the comments contained in this notice by agreeing to the justice of them, the defects of the work can be remedied in that second edition which the profession will doubtless demand.

COMMENTS ON RECENT DECISIONS.

THE INTERSTATE COMMERCE COMMISSION *v.* THE LEHIGH VALLEY RAILROAD COMPANY.

THE decision of the United States Circuit Court for the Eastern District of Pennsylvania, in the case of the Interstate Commerce Commission *v.* the Lehigh Valley Railroad Company, marks another stage in the development of a controversy which is being watched with very great interest by business and railroad men throughout the country. It is true this last decision does not deal with any of the grave constitutional questions which are involved in the case, and that the precise point decided is not a new one, having been similarly held by Judge JACKSON in the Kentucky Circuit;¹ but, as that point is one of great importance in the practical enforcement of the Act to Regulate Commerce, a new decision upon it at this time, and in a case of such importance, cannot fail to draw general attention to certain peculiar features of the act.

This controversy originated in a complaint to the Interstate Commerce Commission by Coxe Brothers & Company, that the railroad company was charging unreasonable rates for the interstate transportation of anthracite coal. The Commission heard the evidence, and, after holding the matter under advisement for over two years, came to the conclusion that the rates in question were unreasonable, and issued an order forbidding the railroad company from making any charges in excess of certain maximum rates. The railroad company not having complied with this order, Coxe Brothers & Company petitioned the Commission to take some steps to secure obedience to their order, and thereupon the Commission, proceeding under the sixteenth section of the Act as amended, applied by petition to the Circuit Court, sitting in equity, praying for a writ of injunction, or other proper process, to restrain the railroad company from further violation of the order. To this petition the railroad company filed an answer, which (beside other defences of a legal character, which it was not necessary to decide at this stage) denied that the rates were unreasonable, and averred that all the findings of fact by the Commission were erroneous, and were not in accordance with the evidence.

Counsel for the Commission, Simon Sterne, Esq., of New York, did not file a replication, but put the case down for hearing on petition and answer, taking the ground that the only questions open for discussion were questions of law, such as the jurisdiction of the Commission, its authority to make such an order, and the constitutionality of the law. He laid stress upon the fact that this was no longer a controversy between Coxe Brothers & Company and the railroad company, but between the railroad company and the Commission, in which the latter was seeking to enforce its order, and argued that upon all matters of fact which had arisen in the former proceeding, the findings of the Commission were conclusive, and such matters of fact were not now open for discussion.

¹ Kentucky, etc., *Bridge Co. v. Louisville, etc., R. R. Co.*, 37 Fed. Rep., 567.

The Court, however, ACHESON, J., writing the opinion, having pointed out that the Act made no distinction between cases in which the petition was filed by the party interested and those in which it was filed by the Commission, refused to acquiesce in the above view, and directed the Commission to file a replication, holding that it was plainly the intention of the Act that the findings of the Commission should be *prima facie* evidence only, and that the language of the sixteenth section showed clearly that it was the duty of the Court to form an independent judgment, which it could only do after hearing all the evidence, including, besides that contained in the report of the Commission, any additional evidence that might be produced by either party. An analysis of this section shows that there can be no doubt as to the correctness of this view. The Court, upon a petition alleging the violation of a "lawful order," is to proceed to "hear and determine the matter," "as a court of equity," "in such manner as to do justice in the premises," and to this end it may prosecute, in such mode and by such persons as it may appoint, all needful "inquiries" to enable it to "form a just judgment" in the matter of the petition; and finally, "on such hearing, the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated."

If this be the state of the law, one may perhaps be permitted to ask of what practical utility is the Commission? Judge JACKSON says: "In respect to interstate commerce matters covered by the law, the Commission may be regarded as the general referee of each and every Circuit Court of the United States upon which the jurisdiction is conferred of enforcing the rights, duties and obligations imposed under the Act." But this can only be so to a very qualified extent, for the same learned Judge refused to give to the findings of the Commission the effect of those of a referee, for he sent the whole case to another referee, who came to an opposite conclusion, which the Court confirmed. Had the complainant in that case been able to proceed in the Circuit Court in the first instance, it would have been saved the expense of the investigation before the Commission (in which each party pays his own costs), which was of really no advantage to it. Indeed, under the present state of the law, an investigation by the Commission is a mockery and a sham, and fails to serve any useful purpose. Under the present method, in order to obtain redress, a complainant must prove his case successively in two separate tribunals, and if he loses in either, relief is denied him. And even if he wins before the Commission, he has gained a very slight advantage; for although a favorable report will be *prima facie* evidence for him in the Circuit Court, yet, owing to several circumstances, this does not amount to much. The respondent is not compelled to show his hand before the Commission, and may keep back testimony which, when produced for the first time in the Court, may rebut the *prima facie* effect of the report, and throw the burden again upon the complainant. Then, the length of time which is likely to elapse (in the Coxe case nearly three years) between the hearing before the Commission and that in the Court, is of itself sufficient to discredit a report, especially upon such a subject as the reasonableness of rates. Nor can a judge who, by the law, is expressly

required to form an independent judgment, be expected to give very great weight to the conclusions which other men have arrived at from an investigation of the same questions into which it is his duty to inquire, especially if he has no particular reason to believe that those men had any better opportunities for eliciting the truth, or were any better fitted for forming an opinion.

The above views, if correct, would seem to lead to the conclusion that either the findings of fact of the Commission should be given the efficacy of a judgment, or the investigation by the Commission should be abolished, and an original proceeding before the Circuit Court, or some special court, substituted. The first proposition involves several grave constitutional questions which were discussed, but not decided, in both the above cases, and into a consideration of which it is not here intended to enter at length, but which may be briefly outlined.

It is perfectly well settled that functions, powers or duties which are properly embraced within what is called by the Constitution "the judicial power of the United States," can only be exercised by the courts of the United States, the judges of which, according to the Constitution, are to hold office during good behavior. It is quite evident that the Commission is not a court of the United States, for its members hold office only during stated periods, and there is no requirement, either of law or usage, that they shall be learned in the law. Judicial functions, therefore, cannot be bestowed upon the Commission. To invest the Commission with power to pass finally upon the reasonableness of rates, etc., would undoubtedly be clothing it with judicial functions; for, says the Supreme Court in *Chicago, etc., R. R. Co. v. Minnesota*,¹ "the question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect of the property itself, without due process of law, and in violation of the Constitution of the United States." And the Court accordingly held in that case, that the statute of Minnesota, which authorized a commission to fix rates and forbade any judicial investigation into the reasonableness of the rates so fixed, was void; and that decision governs the present question, because the constitutional provision in regard to due process of law applies to the United States as well as to the States.

It is quite evident, therefore, that the constitution of the Commission would have to be changed to correspond to that of a court before it could be invested with the power of passing finally upon such questions. To this it may be said that it would be better to abolish the Commission and provide for a similar proceeding in the Circuit Court. Though it may be urged, in support of this view, that the judges of the Circuit Courts, where

¹ 134 U. S., 418.

they have been called upon to construe the Interstate Commerce Act, or to decide questions of fact arising thereunder, have shown a grasp of the subject and an appreciation of the problems equal, if not superior, to that exhibited by the Commission—which was what might be expected from men whose whole training has been such as to fit them for the solution of difficult questions—yet there are compensating disadvantages. The evident reason for the establishment of a permanent Commission, with jurisdiction over the whole subject of interstate commerce, was the hope that by that means consistency and uniformity of policy would result, which it was thought could not be attained in any other way. True, the attainment of this object has been to a very great extent prevented by the frequent changes in the *personnel* of the Commission, and will be entirely frustrated if the present method of trying the cases *de novo* in the Circuit Courts is to continue; but both these obstacles may be in time removed. But to transfer this jurisdiction to the Circuit Courts would make uniformity almost impossible. Just as the Circuit Courts now frequently come to conclusions quite different from those reached by the Commission, after an investigation of the very same facts, so the various Circuit Courts would be likely to differ from each other; for, in deciding matters of fact, precedent counts for little, and on questions depending almost entirely on judgment, courts are always apt to differ. Nor, for the same reason, would an appeal to a higher tribunal, apart from the difficulty which would attend such a proceeding in matters of this kind, be of much avail in securing uniformity.

It would seem, therefore, that the efficient administration of the Act to Regulate Commerce requires the establishment of one Court, whose members shall be learned in the law and hold their offices during good behavior, and which shall have power to hear and determine all matters of fact arising under that Act. It would not be necessary, or, perhaps, wise, to give such a Court the power to enforce its own decrees. All that is needed is one tribunal, in which the evidence shall be produced once and for all, and which shall have authority to pass finally upon matters of fact, and possibly also upon mixed matters of fact and law. To this end the findings of the Court might be given the effect of a verdict of a jury, or of a judgment of a Court of a sister State, which could be enforced in the regular judicial tribunals, to whose decision it would, perhaps, be wiser to leave pure questions of law, such as the construction of the Act, the jurisdiction and authority of the special tribunal, etc. To give such a Court authority to enforce its own decrees would be open to the great objection of placing enormous power in the hands of a few men, and even the proposition to confer upon it the powers above outlined is one which should receive very serious consideration, but into a discussion of the policy of which it is not our province to enter.

FRANCIS COPE HARTSHORNE.

RECENT DECISIONS.

From the current of American and English Cases.

BY

WILLIAM WHARTON SMITH,
HENRY N. SMALTZ,HORACE L. CHEYNEY,
JOHN A. MCCARTHY.

ATTORNEY AND CLIENT—NEGLIGENCE OF ATTORNEY—REDRRESS OF CLIENT.—A, a mortgagee, filed a bill to foreclose the mortgage. B, the mortgagor, employed an attorney to defend the suit. The attorney entered an appearance, but did not file an answer, and the bill was taken *pro confesso*. B. then filed a petition to vacate the judgment on the ground of accident or mistake. Held: That the attorney, as an officer of the Court, was supposed to know about the proceedings of the Court; that there was no such accident or mistake as to entitle B. to have the judgment vacated; and that his only redress was against his attorney: *Butler v. Morse*, Supreme Court of New Hampshire, July 31, 1891 (23 At. Rep., 90).—*W. W. S.*

ARBITRATION—BY-LAWS OF CORPORATION.—Where the by-laws of an incorporated board of trade provide for the appointment of a board of arbitrators to settle all disputes between its members as to sales, etc., and for the appointment of a committee of appeals, who are to determine all appeals from the decision of the arbitrators, which decision is to be final in the controversy, the decision of the committee of appeals that the evidence offered is not sufficient to substantiate a claim, is conclusive, if no offer of further testimony is made: *Vaughn v. Herndon*, Supreme Court of Tennessee, Dec. 19, 1891 (17 S. W. Rep., 793).—*H. L. C.*

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—PROPERTY.—A municipality is a creature of government, and there can be no such thing as contracts between it and a State legislature, but it may be that a municipality cannot be deprived of its property without due process of law. But it was held in this case that the right to tax is not such a vested right of property as is beyond the control of the legislature: *New Orleans v. N. O. Water Works*, Supreme Court of the United States, Dec. 14, 1891 (142 W. S., 79).—*W. D. L.*

CONTRACTS—FACTS EXCUSING PERFORMANCE.—Plaintiff offered by letter to furnish defendants with coal for their line of steamboats for one year at a stated price per ton. Defendants accepted the offer by letter. Before the year expired defendants sold their steamboats and received no more coal. Action was brought to recover damages for breach of contract. Held: that the contract was not for successive deliveries of coal, to be made only upon notice given by the defendants; and though the amount of coal to be delivered was indefinite, yet by the terms of the contract it was determinable, and therefore certain, and the contract was complete and valid for the entire year: *Wells v. Alexander et al.*, New York Court of Appeals, Dec. 1, 1891 (29 N. E. Rep., 142).—*H. N. S.*

CORPORATIONS—ACTION BY STOCKHOLDER—POWER OF ONE TO SUE IN HIS OWN NAME TO ENFORCE A RIGHT OF THE CORPORATION.—Complainant owned stock in the S. Co., of which A. was the president and B. the treasurer. A. also owned stock of the company for which he had not paid. Complainant sued the S. Co.; together with A. and B. to compel A. to pay into the treasury of the company the value of the stock issued to him. It appeared that a majority of the directors were hostile to complainant and partisans of A., and would have refused to enforce the right of the corporation in the present case, or opposed any litigation brought for that purpose. Held: That under such circumstances one stockholder could bring suit in his own name to enforce a right of the corporation without first requesting the directors to sue: *Knoop v. Bolimrich et al.*, Court of Chancery of New Jersey, Nov. 24, 1891 (23 At. Rep., 118).—*W. W. S.*

DISCOVERY—PHYSICAL EXAMINATION OF PARTY.—The statutes which confer upon common law courts the power to compel discovery and inspection of books and papers, do not confer upon the courts power, at the instance of the defendant, to compel the plaintiff, in an action for personal injuries, to submit, in advance of the trial, to an examination by surgeons appointed by the Court: *McQuigan v. Delaware, L. & W. R. R. Co.*, New York Court of Appeals, Dec. 1, 1891 (29 N. E. Rep., 235).—*H. N. S.*

HUSBAND AND WIFE—DIVORCE—ALIMONY.—Complainant brought an action of divorce against his wife, the bill alleging that when he married her she was already married to another man. The defendant admitted this fact. In the course of the trial defendant made an application for alimony and counsel fees, *pendente lite*. Held: That a woman cannot be the wife *de facto* or *de jure* of two husbands at the same time, and, therefore, defendant was not the wife of the complainant; and that an order for alimony and counsel fees could only be made in favor of a wife, and, therefore, defendant was not entitled to such an order: *Freeman v. Freeman*, Court of Chancery of New Jersey, Dec. 15, 1891 (23 At. Rep., 113).—*W. W. S.*

JUDGMENTS—EFFECT OF IN COLLATERAL ACTION.—A. assigned a note held by him to B., guaranteeing its payment. B. transferred it to D. as collateral security, and then made an assignment for the benefit of creditors. D. brought suit against A. on his guarantee, and secured a judgment for the full amount of the note, which was considerably more than B.'s indebtedness to him. Execution was had on the judgment and *nulla bona* returned. D. then filed a bill against A. for the discovery of his property and the appointment of a receiver, making the assignee B. one of the defendants. A. subsequently transferred his interest in the note to R., another defendant on the record. R. filed a cross bill against D., asserting his title to the note. Held: That the suit of D. against A., though judgment was recovered for the full amount of the note, was only conclusive to the amount of the debt due by A. to B., and, therefore, R., who offered to pay this amount, could show that the consideration for the transfer of the note to B. was illegal; and, in spite of the previous

action, the equitable title to the note was vested in him : *Pearce v. Rice*, Supreme Court of the United States, December 7, 1891 (142 U. S., 28).—*W. D. L.*

JURISDICTION—SUPREME COURT OF THE UNITED STATES.—The Supreme Court of the United States has no jurisdiction over an appeal from Circuit Court taken September 19, 1891, from a decree entered July 7, 1890, in a case where the jurisdiction of that Court depended upon the diverse citizenship of parties : *Wauton v. DeWolf*, Supreme Court of the United States, December 21, 1891 (141 U. S., 138).—*W. D. L.*

MORTGAGES—DECREE OF SALE.—In a proper case a Court of Equity has the power to so mould its decree as to order a sale of mortgaged premises to satisfy that part of the debt which is due, and preserve the lien upon the premises in the hands of the purchaser as to that part of the debt which has not matured: *Penna. R. R. Co. v. Allegheny Valley R. R. Co.*, United States Circuit Court, Western District of Pennsylvania, August 31, 1891 (48 Fed. Rep., 139)—*H. S. C.*

PRINCIPAL AND AGENT—RATIFICATION—BENEFITS OF CONTRACT.—The defendant's husband, in consideration of one dollar, conveyed to her land subject to a mortgage that was about to be foreclosed. The plaintiff afterward advanced money to the husband to discharge this mortgage on the faith of his promise, which he made without defendant's knowledge or consent, that a mortgage should be executed to secure the plaintiff. The mortgage was paid off by the husband; but when the defendant was requested to execute a mortgage as security for the loan, she refused. She paid, nevertheless, the recording fees for the discharge of the mortgage, and obtained from the mortgagee a release. Held: That the defendant's acceptance of the benefits accruing from her husband's unauthorized promise was a ratification of his act, and equity would compel her to execute a mortgage to the plaintiff for the amount of his loan : *New York Court of Appeals*, October 27, 1891 (29 N. E. Rep., 228).—*H. N. S.*

PUBLIC IMPROVEMENTS—ESTOPPEL.—The plaintiff, having joined in a petition to grade and improve a street abutting upon his premises, and having paid the assessment without objection, is estopped from claiming damages on the ground that the improvement dammed a water-course, and so overflowed his land : *Hembling v. City of Big Rapids*, Supreme Court of Michigan, December 21, 1891 (50 N. W. Rep., 741).—*J. A. McC.*

RAILROADS—PAYMENT BY RECEIVER FOR MATERIALS.—Where persons have furnished supplies and materials necessary for the running of a railroad, and interest has been paid on mortgage bonds or permanent improvements made out of the earnings of the road during the period when such debts were contracted, the Court which has appointed a receiver will order the amount so used for interest or improvements to be brought in for this class of creditors, either from the earnings in the hands of the receiver, or, failing these, from the *corpus* of the property : *Finance Co. of Penna. v. Charleston C. & C. R. R. Co.*, U. S. Circuit Court, Dist. South Carolina (48 Fed. Rep., 188).—*H. L. C.*

RAILROAD—RIGHTS OF ABUTTING OWNERS—PARTIES.—A corporation built an elevated railroad without condemning the easements of an abutting owner in the highway. The owner leased his lot after the road was built. Held: That he could maintain an action for damages for the impairment of his easement by the existence and maintenance of the road during the time the lot was in the actual possession of his lessee. On the death of the lessor intestate, or after a devise of the land, the right to damages for injuries suffered between the death of decedent and the termination of the lease, goes, with the title, to his heirs or devisees, and not to his administrator: *Kernochaw v. N. Y. El. R. R. Co.*, New York Court of Appeals, December 1, 1891 (29 N. E. Rep., 65).—*H. N. S.*

RAILROAD COMPANIES—LIBEL.—A railroad company may maintain an action of libel for a publication charging them with such negligence and incapacity in the conduct of their business as would induce shippers to refrain from employing the company as a common carrier. Such action may be maintained without proof of special damage: *Ohio and M. Rwy. Co. v. Press Pub. Co.*, U. S. Circuit Court, Southern District of New York, November 17, 1891 (48 Fed. Rep., 206).—*H. L. C.*

RAILROAD COMPANIES—NEGLIGENCE.—A railroad company is not bound to exercise the same degree of care in maintaining its side tracks as its main tracks, and cannot be held liable for an injury which results to an employee through defects in their construction: *O'Connell v. Duluth R. R. Co.*, Supreme Court of Michigan, December 21, 1891 (50 N. W. Rep., 801).—*J. A. McC.*

TELEGRAPH COMPANIES—NEGLIGENCE.—Where a telegram is sent to A., in care of B., at a certain place, and no such person as B. resides in that place, the telegraph company is not thereby relieved from making an attempt to deliver the message to A.; and, failing to make such effort, which, if made, would have been successful, the telegraph company is liable for damages sustained by A.: *Western Union Telegraph Co. v. Houghton*. Supreme Court of Texas, December 15, 1891 (17 S. W. Rep., 846).—*H. L. C.*

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THE ANTHRACITE TRADE SITUATION.—THE
PROBLEM BEFORE THE COMMISSION.

BY THOMAS L. GREENE, ESQ.

English wars are said to have been wars of trade ; the same may be asserted of all commercial actions at law. Before a legal question can arise in cases affecting commercial values, there must be a commercial dispute. The case of *Coxe Bros. & Co. v. the Lehigh Valley Railroad Company*, before the Interstate Commerce Commission and the United States Courts, is an illustration of a legal controversy growing out of complicated questions of trade. The firm of *Coxe Bros. & Co.* are owners and lessees of about 33,000 acres of land in the so-called Lehigh region of the anthracite coal section of Pennsylvania. The output of these lands in 1888 was a little over a million tons of hard coal. The annual output may vary from one and a half to two million tons, forming from three to four per cent. of the total production of anthracite. This coal reached the market in 1888 (when the proceedings before the Interstate Commerce Commission were begun) over the lines of the

Lehigh Valley, the Pennsylvania and the New Jersey Central Railroads. The tolls charged by these roads, from the junction point of Coxe's mine branches to tidewater at New York harbor, were, in that year, \$1.80 per ton on the sizes of hard coal used for domestic purposes, \$1.40 per ton on the sizes called pea and buckwheat, and \$1.20 on the culm or waste.

The anthracite region of Pennsylvania, practically covering the whole supply of hard coal for the United States, contains about 470 square miles. Of the annual product of this region, amounting in 1891 to about 40,000,000 tons, about one-fourth is mined by individual operators,—that is, by those who own or work the coal lands independent of the great carrying companies. The other three-fourths of the supply is mined by coal companies which are owned by the seven great coal railroads, these, of course, having the preponderating influence upon all questions of trade policy. Some of these railroads were originally started as mining corporations, and gradually extended their rail lines in order to find an outlet for their coal. Others bought lands, or bought control of coal companies owning lands, in order that their tonnage of coal might be forever secured to them. The Philadelphia and Reading Railroad, through its subsidiary corporation, the Philadelphia and Reading Coal and Iron Company, made extensive purchases of land as late as the decade 1870 to 1880. Out of the ownership or control of the limited acreage underlaid with hard coal have grown some perplexing questions. Coxe Bros. & Co. are the largest firm among the so-called individual operators. Their suit against the Lehigh Valley involved two principal points. One was, that the tariffs established by the railways on anthracite were so high as to cause hard coal to be displaced by bituminous, or soft coal, for manufacturing and steam-producing purposes.

The average distance to New York harbor from all the mines in the Lehigh region is 149 miles. The average distance from the Snow Shoes bituminous region is 295 miles, and the tolls \$2.25 per ton; from which it will be

seen that the railways carried soft coal at rates almost half those charged anthracite for a corresponding distance. A further fact is, that while anthracite has about doubled its output in the last decade, the bituminous production has been quadrupled. It was argued that these two facts explained each other, and that if lower tariffs were to be charged on anthracite by the carriers, hard coal would again supplant bituminous in the factories of New England and elsewhere. In spite of the rail charges, higher in the aggregate, though lower proportionately, the selling price at tidewater was about one dollar less per ton for soft than for hard coal. For steam purposes it is found that bituminous is about one-tenth better than anthracite. Moreover, during the ten years from 1880 to 1890 hard coal has been quoted at about the same price, allowing for fluctuations, but soft coal has declined one-third; further, the supply of anthracite is practically limited to the region of about 470 square miles in Pennsylvania, while bituminous coal is found over the greater part of the country, the area underlaid being estimated at over 200,000 square miles. This great disparity in the available supply would seem to indicate that nature had decided the question between these two coals for ordinary purposes, for the great and increasingly important use in the making of steam, whether in factory or locomotive boilers. For domestic use the hard coal is everywhere preferred, so that it may be said, because of the limited supply and valuable properties, that anthracite is a special fuel, a luxury, and that the better policy would be to treat it as such.

To this there is the technical objection that coal is coal, and that carriers have no right to discriminate between the two kinds, which, indeed, cannot always be told, the one from the other, even by experts. It is true that there is no dividing line agreed upon, separating anthracite from bituminous coal. Nevertheless, the distinction is real, and forms the practical basis of trade. Just so we find it hard to tell the precise point at which day becomes night, though of the propriety of the distinction we are assured.

The railroad systems of the United States differ in their policy toward these coals. The New England roads generally charge the same rate upon both; the roads of the Middle States distinguish sharply between them in their tariffs; the practice on lines west of Chicago varies. Upon closer analysis, however, it will be seen that these differing policies, in different parts of the United States, are not dictated by favoritism to either kind of coal as a commodity, but rest roughly on commercial conditions. The carriers, in short, charge what they think they can fairly and easily collect as between the two coals. In New England the total cost to consumers of anthracite is not materially affected by the same charge on both kinds, and, besides, the supplanting of hard coal by soft is not yet complete. On the other hand, at the West, where the high price of anthracite puts it out of competition with bituminous for ordinary uses, in the question of the proper railway rate, the supposed rivalry is very little, if at all, considered; the investigation of the traffic officer is limited to the problem, how much he can fairly charge on hard coal, without checking its consumption for the only purpose to which it is applicable, so far from the mines—that of domestic use. In some special cases it is also burned where factories are located in good neighborhoods, in cities, and where the smoke and smudge of soft coal would be too offensive.

The Interstate Commerce Act forbids, not mere discrimination, but *unjust* discrimination. The drawing of distinctions between the many articles carried by our railways, and the consequent sharing of railway expenses among these different articles according as these may be able commercially to bear them (which is the theory of railway classifications and tariffs), have been the cause, in great part, of the enormous development of our railway freighting business in the United States. We cannot now question the right of discriminating one rate or one article from another; the only point which should be considered is whether the discrimination is just. Our railways carry the raw material, wheat, and the manufactured product, flour, at the same rate, though, if warranted, they could

rightly put a higher tariff upon the manufactured article, as they do in other lines of trade. They at one time carried all grains at the same rate, though these, to a certain extent, are competitive products in our markets. Now corn is sometimes classed lower than wheat, and in time each kind of grain may have its own rate fixed upon, after considering its own separate merits and circumstances in our markets. That at one time or on some roads one tariff covered all breadstuffs, is not a good commercial argument against separate rates on wheat, corn, oats and barley, if trade conditions at any time require separate tariffs. So in coal. That at one time or on some roads anthracite and bituminous coals were charged the same rate, is not a good argument against a separation of tariffs, if such separation comes to have justification in existing circumstances. Such justification is apparently furnished by the quantity in the ground—so great and so widely distributed in one case, and so small in the other—and by the properties of the two coals which give to each its special fitness for specific uses. We cannot say whether the increasing use of soft coal induced the lowering of rates, or whether lower rates brought about the greater consumption; but we are reasonably sure that the result is an adjustment of rates to natural conditions, and is, therefore, correctly based.

Another point brought up in the case was the charge that existing tolls were unjust to the individual operators, because when prices were low the coal-mining companies lost money; but their owners, the coal-carrying companies, make large profits in transportation, with the result that the separate operators also lost money in mining, but could not recoup themselves—in short, that the railways discriminated unjustly against their individual shippers by making up the losses to their own mining companies from their profits as carriers. This complex situation grew out of the ownership of the greater part of the anthracite coal lands by coal companies, who were owned in turn by the carriers. The capital required to own and operate both railroad and mine companies was a certain sum. This varied with the different railways according to the different

circumstances of each. And, as is the rule in all combined businesses, the profits of both companies, in the course of years, tended to become such as would pay a fair return upon the capital invested in both, considered as a whole. Naturally, also, in the course of time the stockholders and officers looked to the profit of the year as a vindication of the management, so that the details—which of the combined companies lost and which earned money—would be considered of minor importance. This combined but not separately-stated result would all the more easily come to be the main consideration of the managers, because of the peculiar condition of the coal trade. The anthracite coal in the ground is a definite quantity; every ton mined is so much taken from the limited supply. It has been estimated that some of the coal fields will be exhausted before many years, and that before the middle of the next century there will be a decline in the quantity possible to be mined. Because of this fact anthracite ought, on this account, to be considered every year more and more as a special deposit and more and more valuable. Yet it is also true that the annual output of the coal lands could be much increased, and in some cases doubled, if such increased annual output could be sold. The seven large operating companies have never been able to agree, for any length of time, on the probable demand or on the proportion of the output to which each company should mine. In addition, these companies, when agreed among themselves, have not controlled completely the individual operators who furnish about a fourth of their tonnage. The result of these conflicting interests was to lead the stockholders and officers into the belief that the evils of the trade were almost incurable, and that the only way to realize a profit from the investment, as a whole, was to obtain it from that which they thought could be controlled more easily than the output, the tolls from transportation. These were generally (with occasional exceptions, of course) fixed (either directly or on a percentage of the tide-water price) at such a tariff as left large profits to the carrier, and figured out per ton per mile to be twice the

rates charged on other low-priced commodities by other railways. A profit was thereby assured, even though the mining itself should be unprofitable. But the success of the individual operator depended upon the profitableness of the mine, and not upon that of the transportation company. It was estimated by the Interstate Commerce Commission that the interest on the capital loaned by the Lehigh Valley Railroad to its subsidiary mining company was equivalent to a rebate of 10 cents per ton against Coxe Bros. & Co.'s coal. It was also the practice of the coal company to buy coal from other collieries, and, sending it to market over the railroad, to sell such purchased coal, as well as its own, at prices which sometimes yielded a profit and sometimes did not. This loss under cost at the mines, plus the published transportation rate, was considered by the Interstate Commission to be a discrimination against the individual operator and in favor of the subsidiary mining company, because such loss was finally made up to the mining company by the railroad. Altogether the Commission thought the discrimination amounted to 30 cents per ton on domestic sizes in 1888, the year of the suit. The exact amount of unfair discrimination in the tolls on anthracite to tidewater, as they were in 1888, must, of course, be purely an estimate. The Commissioners thought they were moderate in their proposed reduction. The accounts and policies for the carrying and mining corporations are so intermingled that no exact statement of their business can be had. The trouble is that, so far as three-quarters of the persons interested are concerned, no such statement is necessary. The complaining one-quarter are in a hopeless minority, and are confronted by a situation whose conditions have settled themselves on lines adverse to them. Apparently, therefore, they must soon have entered legal protest or have suffered loss of profits and finally of lands and capital.

As a theoretic solution of the problem, it may be well to consider it as a question of profit-sharing, as such it really is or ought to be. A small part of the coal goes to tidewater on a percentage basis, 40 per cent. of the tide-

water price being the usual toll in such cases. The general toll was, in 1888, \$1.80 per ton, reduced shortly afterward, on domestic sizes, to \$1.70 per ton from the mines to tidewater. When the price of domestic coal averages \$3.50 per ton at New York (and it is sometimes lower), this would leave the operator \$1.70 per ton at the mines. The cost of producing coal is a difficult question to answer precisely, for it varies with circumstances and localities. For an average we may put it at \$1.45 per ton for wages and supplies. To this must be added about 35 cents per ton for average royalty (the royalty being the price paid the owner of the ground by the operator), and 10 cents for commissions on sales, a total, say, of \$1.90 per ton, without considering interest on capital or depreciation. The capital of the complainants, Coxe Bros. & Co., amounted to several millions of dollars. Altogether, and speaking in round numbers by averages, it is considered fair to estimate that the mining operator or company makes no profit, in the true sense of the word, unless a higher price than \$2 per ton is obtained at the colliery. On the basis of \$3.50 per ton at tidewater, allowing \$1.80 for railway tolls, this calculation would show a loss to the operator of 30 cents per ton. The average cost of carrying hard coal from the mines to New York harbor has been theoretically determined by the Interstate Commission to be 93 cents, and the cost of mining, as we have seen, \$1.80; deducting these amounts from \$3.75, an assumed possible average for coal at tidewater, we have 97 cents profit to be divided between carrier and operator. Giving two-thirds of this profit to the carrier would be equivalent to a rate of \$1.57 per ton; if divided equally between carrier and operator, it would give \$1.42 to the former, and \$2.33 to the latter. These computations are, of course, purely theoretical, and are inserted merely to show what might be the prices if the business of mining were separated from the carrying.

No doubt one result of a reduction in tolls on anthracite would be to call the attention of the railway managers again to an old problem in the coal trade—how to limit the supply to the demand—with this difference, that whereas

now their dividends are in a measure assured without forcing an answer to this old question of limiting the output, under a lower rate they would feel compelled to find at least a partial solution.

If we assume the theory to be correct which limits the proper use, broadly speaking, of anthracite to domestic purposes, leaving the steam market generally to bituminous coal, it follows that we thereby narrow the possible demand for hard coal. The quantity required for domestic or special purposes is small compared with the amount of all kinds of coal mined and consumed in the United States, and this required quantity of hard coal will increase from year to year but slowly, only as population increases and as a higher standard of home comfort obtains among us. As a matter of fact, the shipments of anthracite have increased for a decade in greater proportion than this theory would warrant, but there are explanations. In the first place, as before stated, although the contents of the anthracite fields are limited, and before half a century will probably show positive signs of exhaustion, yet the possible annual output now is greater than the actual, large as this latter is. Since railroad and individual operators have not been able to agree upon the proportion each miner is entitled to in any plan of restriction, the total quantity produced has been in excess of the demand for the purposes named. According to a well-known rule in manufacturing, while such overproduction has often brought the price of coal at the collieries below cost, yet the operator, having invested capital in the outfit and employed his men, cannot stop operations because the price is not remunerative, since stoppage would usually entail a still greater loss. Hence, practically, the supply is not, and under existing conditions cannot be, strictly regulated to correspond to trade requirements. If the conditions, therefore, are allowed to continue, they must work themselves out by heavy losses to the weaker parties in the end.

Another explanation of the fact that shipments are larger than the domestic demand is to be found in the quantity of small coal sold. In mining the large sizes of

anthracite, there remains smaller sizes of coal called buck-wheat, pea and culm, the latter being coal dust. On the ground that while the larger sizes were valuable and should pay higher rates, the smaller sizes were fairly a competing product with bituminous and should be charged less, the carriers generally have transported these small sizes at forty cents or sixty cents less per ton to tidewater. Owing to a variety of reasons not necessary to state here, these small sizes have not been entirely successful as against soft coal, but are so to a certain degree. Of the large increase in recent years in shipments of anthracite, a good part has been in these smaller sizes or culm. The increase in domestic sizes during the ten years was 18 per cent., while in the inferior product it was 139 per cent. In 1879 the small sizes and waste constituted but 17 per cent. of the shipments; now these make up nearly one-third.

The public have a real interest in helping to stop this waste in an important article, limited in quantity, like anthracite coal. It ought to be possible to arrange the coal output so that only as much should be mined as would suffice to supply the domestic and special demands; then our children would not be deprived of a luxury which this generation is enjoying and wasting. Such a plan requires the combination of some kind between the coal companies, so that some person or persons should decide for the whole trade what the output fairly should be, and what proportion should be allotted to each company. This would involve restriction, and this in turn would require that the quantity needed should return a fair profit to the miner. It is at this suggestion that the public may be expected to protest. But whether right or wrong on the general subject of monopolies and trusts, it seems clear that the public, in the matter of coal, would have no cause for alarm or complaint. The price of anthracite cannot be put extortionately high even though a strong combination be formed. Gas, oil and, more than all, cheap bituminous coal must always fix a limit beyond which the price of anthracite cannot go without stopping consumption. A luxury, such as we have assumed anthracite to be, is the first thing to be

given up if the cost should be too high, particularly if a number of other fuels, not so good for comfort and cleanliness, but nearly or quite as good for heating and cooking, can be had at much cheaper prices.

The point in this matter is, that since the people at large would not be injured but rather benefited by a better control over a special gift of nature, popular opposition to a moderate restriction of coal mining ought, when the facts become known, to die away.

In any plan for restriction the independent operators must be consulted. They control a quarter of the output, and could, by active mining, break down the market, no matter what the great companies decided without them. Altogether, a very small output and a correspondingly extortionate price upon anthracite are not possible. The possible thing is a little better arrangement about present output and wholesale prices, and this the public, in its own interest and that of succeeding generations, ought to support.

But the situation, it will be seen, is made difficult by the large profit now obtained by the carriers as compared with the small profit, or even the loss, of the mining operator. This breeds indifference to trade evils on the part of the railroads, their officers and salesagents. If a fair division could be agreed upon, either by negotiation or through the law courts—the legal complications of this latter course are great, though the economic facts are clear—then a way would be opened for a discussion of the further question on the part of all concerned of restricting the supply of anthracite to the proper demand for it. It would be a mistake to suppose that the case of Coxe Bros. & Co., if decided favorably to them, would solve all the trade problems. But since justice and law seem to be on their side, such an agreement or decision would be a long step toward a solution of these other questions.

Public opinion ought to sustain, and not condemn, any efforts made, or which may be made, to settle the complicated anthracite situation on a basis that shall be fair to the miners, the carriers and the consumers.

THE INTERSTATE COMMERCE COMMISSION BEFORE THE FEDERAL COURTS.

BY CRAWFORD HENING.

The Interstate Commerce Commission, created by the Act of February 4, 1887 (commonly known as the Interstate Commerce Act), appears as plaintiff in several suits now pending before the Federal Courts, instituted to enforce the orders of the Commission.

There results from this litigation a number of judicial decisions upon important questions of constitutional law and the law of interstate commerce affecting the powers and duties of the Commission and the rights and remedies of parties complaining of violations of the act. Though none of these cases has been passed upon by the Supreme Court, the uniformity of the decisions rendered by the Circuit Courts upon many points indicates the trend of judicial opinion and foretells the judgment of the final authority.

The grave importance of these questions to the business interests and transportation agencies of the country invites an examination of the legal questions at issue, with the view of so modifying the existing statute as to harmonize its provisions with the decisions of the judiciary and the exigencies of the case.

I. *What effect and weight are due to the findings of fact of the Interstate Commerce Commission, when the same are duly ascertained, reported in writing, and, having been duly certified, are offered in evidence in subsequent judicial proceedings in the Circuit Courts, according to Section 14 of the act?*

This point has been uniformly decided by three, at least, of the Circuit Courts.¹ In all of these cases the findings of the Commission have been totally ignored, and the party seeking relief compelled to produce his evidence

¹ Kentucky & Indiana Bridge Co. v. L. & N. R. R. Co., 37 F. R., 567; Interstate Commerce Commission v. B. & O. R. R., 43 F. R., 48; Interstate Commerce Commission v. L. V. R. R. (not yet reported).

de novo before the Circuit Court. In the first two instances cited the decision of the Commission has been reversed and their order revoked.

In the case of the Interstate Commerce Commission *v.* Lehigh Valley Railroad Co., a motion was made for a preliminary injunction to enforce the order of the Commission as based upon its findings of fact. The Court, through an opinion by Judge ACHESON, decided that the motion must be denied. At present, it is a sufficient statement of the facts of this case to say that at the complaint of Cox Bros. & Co. against the Lehigh Valley Railroad Co., filed October 19, 1888, an investigation was begun, and the railroad company having answered the complaint, the Commission devoted five days to hearing testimony and two days to hearing argument; that on March 13, 1891, the Commission made a report in writing of the findings of fact, and decided that the rates charged complainant by the defendant for transporting coal from the anthracite regions of Pennsylvania to Perth Amboy, N. J., were unjust and unreasonable and in violation of the first section of the act to regulate commerce; that an order was made on the defendant corporation to "wholly cease from charging any greater compensation for the transportation of divers known kinds and sizes of anthracite coal from the Lehigh anthracite coal regions of Pennsylvania to Perth Amboy, N. J., than certain maximum rates fixed by the Commission in its order; that the petition filed by the Commission in the Federal Court includes a certified copy of the report of the findings of fact, together with the order made upon the defendant; that the answer of the Lehigh Valley Railroad Co. admits explicitly that the order was made on the defendants as alleged, and that it had refused compliance;" but the answer averred "that the findings of fact upon which the Commission based its decision that the charges to Perth Amboy, N. J., from the coal regions of Pennsylvania were unjust and unreasonable were not in accordance with the evidence or with the law."

An examination of the statute leaves no room for doubt that the decision of the Court upon this record, however

fatal to the efficiency of the Commission, was, nevertheless, a correct interpretation of the existing law. Section 14 of the statute declares that the findings of fact of the Commission "shall thereafter, in all judicial proceedings, be deemed *prima-facie* evidence as to each and every fact found." "What is *prima-facie* evidence?" asks Mr. Justice STORY, in *Kelly v. Jackson*.¹ "It is," he observes, "such as in judgment of law is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose." The counsel for the Commission endeavored, in their argument, to confound *prima-facie* evidence with conclusive evidence. They further endeavored to give to these findings the effect of a judicial judgment. "Every judgment is conclusive proof as against parties and privies of facts directly in the case actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based."² If Congress had intended that the decision of the Commission should have the effect of a judgment, it would not have used language which contemplates a subsequent trial of the case upon its merits, in which the findings of the Commission are to have the weight of *prima-facie* evidence. The argument of Mr. Sterne (of counsel for the Commission), that the only facts re-triable by the Circuit Court are "(1) Jurisdictional questions of whether the defendant has been properly served; (2) jurisdictional questions of whether the subject-matter is within the cognizance of the Commission; (3) the issue of fact, whether the order has been obeyed or disobeyed," is negatived by the words of the act itself, which makes no distinction between the effect of facts found, but makes the findings of the Commission "*prima-facie*" evidence "as to each and every fact found." Moreover, the act clearly provides for a re-trial of all the facts before the Circuit Court. Section 18 empowers the Court, "if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful to enable it to form a just judgment in the

¹ 6 Peters, 632.

² Stephen on Evidence, p. 87.

matter of such petition, and on such hearing the findings of fact in the report of said Commission shall be *prima-facie* evidence of the matters therein stated." Nor is the distinction tenable between the effect of these findings when offered as evidence by a shipper seeking to enforce an order of the Commission in his favor, and the effect of these findings when offered by the Commission itself. The same words of the act grammatically apply to both cases, and in neither case have the findings more weight than that of *prima-facie* evidence, whose effect is merely to transfer the burden of proof from the plaintiff to the defendant.¹

The argument that the Commission is a court, and that, therefore, its decisions are conclusive like the judgments of a sister State, has been regarded with little favor by the Federal judges. In *Kentucky & Indiana Bridge Co. v. L. & N. R. R. Co.*, *supra*, Judge JACKSON held that the Commission is merely a referee of the Circuit Court, and in support of this position he argues that the Commission cannot be a court constitutionally organized, because its members hold only for a fixed period, and not during good behavior. Congress may, however, create legislative courts exercising administrative power only, and whose judges, being invested with none of the judicial power of the United States, may hold office otherwise than during good behavior.²

"Notwithstanding the judge's misconception of a point of constitutional law," to use Mr. Sterne's expression, "the conclusion is apparent that the effects of the decisions of a 'legislative court' are necessarily conclusive, but are controlled by the terms of the act creating it." "If," says Judge ACHESON, in *Interstate Commerce Commission v. Lehigh Valley Railroad Co.*, "the acts of Congress had been silent as to the effect to be given to findings of fact by the Interstate Commerce Commission, it might, perhaps, have been reasonably inferable that the legislative intent was that those findings should fall within the general rule, that

¹ See also *State ex rel. Board of Transportation v. Freemont, E. & M. R. R. Co.*, 35 Fed. Reporter, 118.

² *American Insurance Co. v. Canter*, 1 Peters, 511.

where the law has confided to a special tribunal the authority to hear and determine certain matters in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all other tribunals, but any such implication is excluded by the express terms of the Interstate Commerce Act."

The true construction of the meaning of the law upon this point may, therefore, be summed up in the opinion of Judge ACHESON: "That the Court is not confined to a mere examination of the acts, as heard and reported by the Commissioners, but hears and determines the case, *de novo*, upon proper pleadings and proof that include, not only the *prima-facie* facts reported by the Commission, but all other and further testimony as either party may introduce bearing upon the matters in controversy."

The practical effects of this interpretation are such as to clearly demand an amendment to the act. The question naturally arises, Will shippers make complaints to the Commission as heretofore, or will they proceed in the first instance to endeavor to enforce their rights in the Federal Courts? If the first course be adopted, complaints are involved in the expense, labor and delay of twice presenting their testimony, and that, too, with no compensating advantages. Experience shows that a favorable decision by the Commission, and the offering of its findings of facts as evidence in the Circuit Court, is of no practical assistance. Moreover, questions as to the propriety of railroad rates relate only to present conditions, and a decision, to be of any value, must be rendered without delay. If, on the other hand, the Circuit Courts have jurisdiction to enforce, by injunction, not merely the lawful orders of the Commission, but also the provision of the act independently of a previous complaint to that body, shippers will obtain redress in the Federal Courts in the first instance. The Interstate Commerce Commission will become a non-entity, and the Federal Courts will be compelled to decide a multitude of railroad problems whose correct solution depends not on the application of legal precedents, but upon a practical acquaintance with the details of railroad management.

In advance of judicial decisions, it is difficult to say whether the Circuit Courts will maintain or deny their original jurisdiction to issue such injunctions. This much, however, may be argued in favor of the power. The remedies prescribed by the act itself, it is expressly declared by Section 22, are not "in any way to abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Section 716 of the Revised Statutes declares that "the Circuit Courts shall have power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." The inadequacy of even punitive damages as a remedy against continuing the excessive charges or future discriminations, together with the policy of equity to prevent a multiplicity of suits, would seem to furnish a substantial basis for the jurisdiction without a previous order of the Commission. But it is unnecessary to determine which of these alternatives will result, as both would be equally desirable from a mercantile standpoint, especially since amendatory legislation will obviate both difficulties.

II. *Is the Act of February 4, 1887, unconstitutional as involving a delegation of legislative power?* It is postulated that the constitutional power to regulate commerce includes the power to fix railroad rates. Chief Justice MARSHALL, in *Gibbons v. Ogden*, construed the words "power to regulate" as follows: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." And in the same case Mr. Justice JOHNSON declared that "the power is the same as that which previously existed in the sovereign States, and that the power of a sovereign State over commerce is the power to limit and restrain it at pleasure."

The only question open, therefore, is, whether the Commission may constitutionally exercise this power. That the act to regulate commerce conferred upon the Com-

mission the power to fix rates is a logical conclusion from the words of Section 12 of the act: "The Commission is hereby authorized and required to execute and enforce the provisions of this act." If, then, the act declares, as in Section 1, that "all charges made for any services rendered, or to be rendered, in the transportation of passengers or property, shall be reasonable and just, and every unjust and unreasonable charge for such services is prohibited and declared to be unlawful," the Commission must either have the power to declare what are just rates, or the absurdity follows that any reduction whatever is a compliance with the order, and a just and reasonable rate can only be obtained by a shipper by successive litigations. While it is true that "one of the set maxims of constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority,"¹ nevertheless this maxim is subject to several exceptions and modifications, and is rather a fiction of political science than a precise principle of law. In LOCKE on Civil Government,² a discriminating analysis reveals the fact that the functions of the three departments of government cannot be thus logically differentiated, and numerous legal decisions establish that the functions of one department may constitutionally partake of the character of the others. Municipal governments illustrate, perhaps, the first class of exceptions, but a no less important exception is made in the case of railroad commissions. In *Chicago & N. W. Railroad v. Dey et al.*,³ an injunction was asked for to restrain the Commissioners from enforcing their schedule of rates because the power to "fix rates for common carriers" is a legislative function and cannot be delegated to commissioners. The Court held that there was no delegation, as the fixing of rates was merely an administrative function.

"It seems to us that the authority and discretion conferred upon this Commission is of the latter kind. The

¹ Cooley on Constitutional Limitations, 137.

² Sec. 142.

³ 4 Ry. and Corp., L. J., 465.

Legislature enacts that all freight rates and passenger rates shall be just and reasonable, and what are equal and reasonable rates is a question depending upon an infinite and ever-changing variety of circumstances. We are referred to no case where the grant of such authority and discretion to a board or commission has been held invalid as the delegation of legislative power, but numerous decisions sustain the validity."¹ In *Commission v. Milwaukee & St. Paul Railroad* the Supreme Court of Minnesota used this language: "The difference between the departments undoubtedly is that the legislative makes, the executive executes and the judiciary construes the law; but the maker of the law may submit something to the discretion of the other departments, and the precise boundary of this power is a subject of difficulty, a delicate inquiry into which a court will not unnecessarily enter."²

In *Tilley v. Savannah, Florida & Western Railroad*,³ the Court sustained the constitutionality of the Commission and said: "The true distinction, therefore, is between the delegation of power to make a law which necessarily involves a discretion as to what it shall be and the conferring an authority or discretion as to its execution by exercise under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."⁴

III. Is it constitutional for the Commission to condemn as unreasonable and unjust rates charged by common carriers of interstate commerce so long as those rates are not greater than those permitted to be charged by the carrier corporations in their charters which they have obtained from State legislatures?

The inquiry under this head would naturally be directed to two points: (1) Has the State Legislature used language equivalent to a renunciation of all future interference, and

¹To the same effect are *Tilley v. Savannah, Florida & Western Railroad*, 5 Fed. Rep., 658; *State ex rel. Commission v. Chicago, Milwaukee & St. Paul Railroad*, 37 N. W. Rep., 782.

²Citing *Wayman v. Southard*, 10 Wheaton, 46.

³5 Fed. Rep., 641.

⁴See also *Georgia Banking Co. v. Smith*, 128 U. S., 181.

therefore established a contractual relation between the State and the carrier? (2) Does the subject-matter of the contract lie within the domain of a State legislature? It is clear that even when the terms of the charter constitute a positive contract between the legislature and the railroad corporation, such an agreement is binding only upon the State itself which entered into the contract, and necessarily imposes no obligation upon another sovereign power in respect to the corporation when within the latter's dominion. Hence, in cases arising under the Interstate Commerce Act, all inquiry as to the exact meaning of the "terms of exclusion" employed in State charters is dispensed with. The power of Congress over interstate commerce, as has been said, is an exclusive power.¹ Consequently, even in the absence of Congressional regulation, no State could have entered into more than a *nudum pactum* with reference to its future regulation of interstate commerce. However binding such a contract might be as to a State's internal commerce, it imposes no obligation whatever upon Congress. Nor can the fact that a corporation is chartered by all of the States through which it transports interstate traffic, and that these charters constitute contracts in respect to the maximum rates to be charged, authorize the railroad to charge any rates within the maximum, if those rates are condemned by the Federal Government.

In *Norfolk & Western Railroad Co. v. Pennsylvania*,² Mr. Justice LAMAR clearly states this doctrine: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some through two or more States, does not in any respect affect the character of the transaction, and to the extent to which each agency acts in that transaction it is subject to the regulation of commerce." States of the Union having once parted with the power to regulate com-

¹ *Leisy v. Hardin*, 135 U. S., 100.

² 136 U. S., 114.

merce among the several States by ratifying the Constitution, and having conferred that power upon Congress exclusively, all charters subsequently granted must conform to this organic law, and no State charters can, therefore, confer upon common carriers exemption in the smallest degree from the regulation by Congress of their interstate traffic.

IV. *If the final and absolute power to fix rates were conferred on the Interstate Commerce Commission, would the exercise of such a power involve a deprivation of property "without due process of law?"*

The cases of Chicago, etc., Railroad Co. v. Minnesota,¹ and Minneapolis & Eastern Railroad Co. v. Minnesota,² are instructive upon this point. The former case came before the Supreme Court upon a writ of error to review a judgment of the Supreme Court of Minnesota awarding a writ of mandamus against the Chicago, Milwaukee & St. Paul Railroad Co. The act of Minnesota, under which the controversy arose, provided that in case the "Commission shall find, at any time, that any part of the tariffs of charges filed and published by common carriers is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed to compel any common carrier to change the same and to adopt such charge as the Commission shall declare to be equal and reasonable."

The company having refused to adopt the schedule fixed by the Commission, the latter sought to enforce compliance by mandamus. The United States Supreme Court decided (Mr. Justice BLATCHFORD delivering the opinion) that the Minnesota statute in effect deprived the company of its right to a judicial investigation by due process of law. From this opinion Justices BRADLEY, GRAY and LAMAR dissented. Its importance in application to the Interstate Commerce Act or to proposed amendments to the same cannot be exaggerated. It must be admitted that as the Minnesota statute made no provision for a hearing, for a summons or for notice to the company, and afforded no opportunity for it to introduce witnesses before the Com-

¹ 134 U. S., 418.

² *Id.*, 467.

mission, while the Interstate Commerce Act secures all these rights to the carrying companies, the two cases are not entirely parallel, but the point in the one sufficiently resembles that in the other to make this decision a controlling authority and a valuable guide to constitutional legislation. The conclusion was reached in the preceding section of this article that conferring upon the Commission the final and absolute power of making rates was not a delegation of legislative power; but the question now arises whether conferring power upon the Commission to determine what are just and reasonable rates is not an unconstitutional transfer of judicial functions to a non-judicial, administrative body. The Act of Congress, making all charges just and reasonable, was, properly speaking, a legislative act declarative of the common law.¹

The determination of the two questions which naturally follow (1) what is a just and reasonable rate in the absence of a definition by the legislature, and (2) is any given rate just and reasonable, is clearly the function of the judicial department. It will be remembered that the distinction was made under the head of the delegation of power between declaring what the law shall be and applying a well-defined law to particular facts. In the latter case, there is clearly no legislative power exercised; but when a commission undertakes to say what is a just and reasonable rate, what are like and contemporaneous services, what are substantially similar circumstances and conditions, it attempts not merely to apply the law, but to ascertain primarily what the law is. The Interstate Commerce Act requires to be expounded before it can be applied, and to expound the Federal law is the business of the Federal Courts. The case of the Chicago, etc., Railroad Co. v. Minnesota is a direct authority upon the point that a legislature cannot confer the final determination of a question of law upon a railroad commission. The Court used the following language: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the

¹ Menacho v. Ward, 27 F. R., 29.

company and as regards the public, is eminently a question for judicial investigation requiring due process of law for its determination."

The dissenting opinion of Mr. Justice BRADLEY, who admits that "what is a reasonable charge is pre-eminently a legislative question" and not a judicial one, admits that "where the Legislature declares that the charges shall be reasonable, or, which is just the same thing, allows the common-law rule to that effect to stand, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable." But what practical difference is there between this supposed case and the one under discussion? In making the decision of the Commission final, the Legislature does not obviate the fact that they have enacted a law and referred it for interpretation to a mere creature of the legislative department. To shut off all judicial inquiry into the meaning of the act would be to extend the prerogative of an administrative body decidedly beyond their constitutional limits. The distinction is patent between the right of the Legislature to enact, in the first instance, that no rate shall exceed a certain maximum per ton per mile, and an enactment that all rates shall be just and reasonable. In the first case there is no question for the courts to decide, but in the second case the question is eminently a judicial one. Between these two cases lies the case under discussion, viz., where the Legislature empowers a commission to determine finally and absolutely what are just and reasonable rates.

Since, however, in the second case, the Legislature cannot define the meaning of just and reasonable rates except by the enactment of another statute, it is difficult to see how a commission can finally construe those terms without usurping either judicial or legislative functions. It may, indeed, be, as is hereafter contended, that the term "reasonable rates" is not capable of a general definition, but will vary according to the peculiar facts of each particular case. Nevertheless, even this construction can come only from the judicial department.

V. *General Conclusions.*

From an examination of the foregoing constitutional questions arising in the suits of the Interstate Commerce Commission, it appears that while expediency dictates an amendment of the act, there are certain well-defined limitations within which amendments must be made to render them constitutionally effectual. Such a scheme of amendment as that proposed by the Commission itself, in its Fourth Annual Report,¹ viz., that "on the hearing in the Circuit Court all findings of fact made by the Commission shall be deemed and held conclusive, unless found by the Court on the record to be erroneous, and all questions of law arising in said proceeding shall be heard, considered and determined by said Circuit Court as though they had not been heard, considered and determined by the Commission in any manner whatever," while designed to make the findings of fact of the Commission not merely *prima-facie* evidence, but conclusive evidence, would not effect that result.

What is a question of law, and what is a question of fact? In the past the effort of the Commission has been to treat all questions as questions of fact, while, on the other hand, the Circuit Court have reached a conclusion different from the decision of the Commission by treating the point at issue as merely a question of the judicial interpretation of the statute. Thus in the case of the Interstate Commerce Commission *v.* Baltimore and Ohio Railroad,² it was found *as a fact* by the Commission that "party-rate tickets" were a style or variety of tickets differing from excursion, commutation or mileage tickets (the three exceptions enumerated in the section prohibiting discriminations), and, therefore, the conclusion of law followed that "party-rate tickets" were illegal; but the Circuit Court treated the question, are "party-rate tickets" a discrimination? not as a mixed question of law and fact, but as purely a question of law. They construed the word "commutation"

¹ Pp. 20, 21.

² 43 Fed. Rep., 48.

in the act to be a generic term sufficiently broad to include the particular variety known as "party-rate tickets."¹

Plainly, the questions, what in any given case is a reasonable or unreasonable rate, what are substantially similar circumstances and conditions, what is undue or unreasonable preference or advantage, what is undue or unreasonable prejudice or disadvantage, are all mixed questions of law and fact which have never received either legislative or judicial definition. Whether a particular case falls within the line is, of course, a question of fact; but inasmuch as the line between questions of law and fact cannot be accurately drawn for all cases, and as the judicial power of the United States extends to all cases arising under the laws of the United States, the suggestions of the Commission, if adopted, would simply perpetuate the present undesirable practice of trying every question twice, first as one of fact and then as one of law. Another constitutional limitation which must be borne in mind by the legislator proposing amendments to the Interstate Commerce Act is, that the judicial power of the United States is vested by the Constitution in one Supreme Court and in inferior courts whose judges hold office during good behavior. No body of men, therefore, can render an absolute and final decision upon questions of law within the province of the judiciary unless those men constitute an inferior court and hold office during good behavior. It is apparent that the task of finally and authoritatively defining the terms of the Interstate Commerce Act is judicial in its character, and one that can never be constitutionally final and absolute when performed by commissioners whose tenure is only for a term of years. Enough has been said to prove the proposition that future legislation must proceed upon the plan of referring all questions arising under the Interstate Commerce Act to a constitutionally organized Federal Court.

A system of procedure which would refer to the Federal Courts all questions arising under the Interstate Com-

¹ See, in this connection, *Samuels v. L. & N. R. R. Co.*, 31 Fed. Rep., 58; *United States v. Tozer*, 2 I. C. C. Rep., 540; 39 Fed. Rep., 369.

merce Act would prevent the delays and embarrassments of the present practice. The judgments of such a court would necessarily be conclusive as to the facts found and not merely *prima-facie* evidence. No question could then arise as to the delegation of legislative power, and the process of law, in the most comprehensive sense, would be secured.

Two alternatives, then, present themselves to the legislator : (1) shall the idea of a commission be discarded and the enforcement of the Interstate Commerce Act be left exclusively to the Federal Courts ; or (2) shall Congress confer judicial powers upon the Interstate Commerce Commission, invest them with tenure for life, dependent only upon good behavior ? .

If the enforcement of the Interstate Commerce Act required merely the application of certain well-defined principles of law to the various cases arising under it, no plan could be more desirable than to refer the entire matter to Federal judges, learned in the law. But a slight reflection shows that questions concerning the reasonableness of interstate railroad rates, while they undoubtedly demand the exercise of judicial powers, in the interpretation of the statute, require also an intimate acquaintance with the complex details of the business of railroad transportation. For example, take the question, what in any particular case is a reasonable rate? To answer this question properly a court cannot look to precedent or authority, because there is none. Nor is any one criterion adequate. You cannot determine the reasonableness of a rate exclusively by the weight or by the bulk or by the value of a commodity transported. To impose a certain charge per ton per mile for all articles would effectually prevent those whose value is small in proportion to their weight from ever reaching the market. So, too, if bulk were the only determinant. It may be said that the minimum charge on any commodity should be the cost of carrying it, plus a fair profit to the carrier for the service. But this theory disregards the fact that the cost of transportation will vary according to weight and bulk, and thus heavier and larger articles will be charged more in propor-

tion to their value than smaller and lighter ones. To ascertain, therefore, what is a just and reasonable rate for any particular commodity, the entire schedule of rates must be considered, and such a classification adopted as will impose heavier rates upon articles whose value is greater in proportion to their bulk or weight instead of placing upon any traffic a greater burden than it can bear.¹ But, again, in making a just and reasonable rate, one must consider the interest of the railroad company as well as that of the shipper; the cost of construction, of running expenses, of necessary improvements, of the introduction of new appliances, are all elements in the problem. It is clearly impossible to promulgate any general rule as to the amount of income to be devoted to these purposes, just as it is impossible to say what dividends on the stock or what interest on the bonds and mortgages railroads in general must earn enough to pay. It has been said that rates should never be fixed so low that the company cannot pay interest upon its obligations and some dividends to its stockholders. But if no rates were excessive so long as the entire income of a road was not sufficient to pay dividends, the shipper would be at the mercy of bankrupt railroads which never have and never will pay dividends. By charging ordinary rates such railroads are nevertheless able to pay running expenses, and thus serve the interests of the public. Nor would it be sufficient for the Circuit judges to possess a knowledge of the traffic and finances of merely the defendant corporation. They must not only have the information possessed by a general freight agent, a general passenger agent, and a board of directors of the railroad whose rates are the subject of inquiry, but a similar acquaintance with the business of rival carriers. No railroad can be considered singly, but only as part of the general transportation system of the country. A rate, to be just and reasonable, must have regard to the interests not only of the shipper and carrier, but also to the interests of competing roads. Without pressing the inquiry further, the conclusion is evident that the powers necessary to a wise administration of the

¹ See preceding article on "The Anthracite Coal Situation."

Interstate Commerce Act should be confided by Congress to a body of men who can devote to the investigation of these questions of transportation their exclusive time and attention, and who will render decisions based upon the exercise of a sound business discretion.

The Federal judges cannot devote the time to these questions which their complexity and importance demand. Even if they could give such subjects adequate attention, the diversity of their decisions in different circuits upon practically similar facts would prevent a uniform development of the law and furnish no practical guide for business men. The extra delay consequent upon increasing the amount of business now before the courts is a substantial objection to referring to their decision such questions as those concerning rates, in which a decision must be summarily rendered and enforced, or the delay practically defeats the remedy.

Without entering into minute details, there are several points which should commend themselves to a legislator when drafting an amendment to the existing law. Experiment has shown that three classes of questions arise under the Interstate Commerce Act : (a) pure questions of fact, *e. g.*, whether a rebate has been given, whether a less sum has been charged to one shipper than to another, or what are the annual earnings of a corporation; (b) mixed questions of fact and law, *e. g.*, what is a reasonable rate, what are substantially similar circumstances and conditions, what is a like and contemporaneous service; (c) pure questions of law, *e. g.*, whether express companies doing business over the roads of common carriers are subject to the provisions of the act, or questions of construction of contracts or leases.

A properly constructed judicial system designed to enforce the act to regulate commerce would clothe the Commission with judicial powers and confer upon it exclusive jurisdiction to entertain suits for damages, or enforce its decisions by injunction or other summary process in all cases arising under the act. The final decision of all mere questions of fact should be confided to the Commission with

an appeal upon pure questions of law and mixed questions of law and fact to the Supreme Court, according to that general policy of the law which leaves questions of fact to be conclusively settled by the Court which hears the testimony and refers only questions of law to the appellate tribunal. All those mixed questions which lie upon the borderline of law and fact would gradually be relegated to the former class upon which the decision of the Commission, as a Federal Court, would be final. Much of the disfavor with which the courts now regard the findings and decisions of the Commission originate in a natural feeling of jealousy and of hostility to the usurpation of judicial powers. The effect of the system above outlined would be to produce a uniform and consistent body of interstate commerce law, judicially expounded and efficiently enforced.

THE RECIPROCITY ACTS OF 1890—ARE THEY CONSTITUTIONAL?

BY EDWARD B. WHITNEY, ESQ.

"Whenever the President shall be satisfied that unjust discriminations are made" by a foreign State against American products, "he may direct that *such products* of such foreign State, . . . *as he may deem proper*, shall be excluded from the United States," and may "revoke, modify, terminate or renew any such direction *as in his opinion the public interest may require*."¹

"With a view to securing reciprocal trade with countries producing the following articles, . . . whenever and so often as the President shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposing duties or other exactions upon the agricultural or other products of the United States, *which, in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States, he may deem to be reciprocally unequal and unreasonable*, he shall have the power, and it shall be his duty," to issue a proclamation levying, instead, certain fixed taxes upon "such sugar, molasses, coffee, tea and hides, the production of such country, *for such time as he shall deem just*."²

¹ Food Act of August 19, 1890, § 5.

² McKinley Tariff Act of October 1, 1890, § 3.

These two clauses comprise the famous reciprocity legislation of the Fifty-first Congress. Both have been questioned as unconstitutional. The latter has been challenged in the courts, and at the hour of this writing is awaiting the decision of the Supreme Court of the United States.¹

Reciprocity, however, is not the feature that is challenged. Reciprocity laws and retaliation laws have come down to us from time immemorial. Their validity is unquestioned and unquestionable. They will last as long as protective tariffs and commercial restrictions. They exist not only between nations, but between the different States of our Union,² and even in the latter case their constitutionality has years since been sustained by the supreme tribunal.³

Nor may the legislation be brought in question before the courts as a possible violation of treaty rights. Such an opposition was made in Congress, and with grave reason. Many or most of our treaties contain the well-known "most-favored nation" clause, or something stronger. With such a clause the levying of special import duties may be difficult to reconcile. But the Constitution is not violated when a statute expressly or impliedly repeals a treaty.⁴ One is as much the law of the land as the other. Nobody can complain but the foreign nation whose treaty rights are broken, and that complaint must be made to the executive, not to the judicial branch of our government. It is a question of diplomacy and not of law.

The Reciprocity Acts of 1890 are met with the charge that they are not complete laws in themselves; with the charge that they are a delegation of the legislative power and duty of Congress to an individual, the President of the United States. The laying of a tax is a legislative act.⁵ So is the regulation of commerce in times of peace. The

¹ *Boyd, Sutton & Co. v. U. S.*; *H. Herrman Sternbach & Co. v. U. S.*, argued November, 1891. [Since decided, February 29, 1892.]

² "Commercial Retaliation between the States," *Am. Law Review*, Feb., 1885.

³ *Fire Association v. New York*, 119 U. S., 110.

⁴ *Chinese Exclusion Case*, 130 U. S., 581; *Whitney v. Robertson*, 124 U. S., 190; *Head Money Cases*, 112 U. S., 580, 599.

⁵ *New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S., 18, 31.

discretion of the Legislature is exercised upon two main problems in the consideration of a proposed statute. One is, whether there is a mischief calling for a remedy. The other is the nature and extent of the remedy to be applied. In the McKinley Act the former problem especially, in the Food Act the latter, is left entirely to the President for solution. Of the two distinctively legislative functions, each statute delegates one. If this is constitutional, then both functions may be delegated in the same statute. Then it will be constitutional for Congress to say to the President: "If you think foreign tariffs are unreasonable, you may exclude at your discretion any or all foreign products, or you may tax them." For the power to exclude involves the power to impose license fees,¹ and that is the power to tax.

The discussion thus reopened is one of the oldest and most fundamental, while one of the most difficult and obscure and most unsettled, in all our jurisprudence. The first provision of the Federal Constitution is, that "All legislative powers herein granted shall be vested in a Congress of the United States." State constitutions contain similar provisions. In Federal and State courts alike the general principle has always been laid down and never been disputed, that the legislative power cannot be delegated.² Some State courts have gone so far as to deny the right of the Legislature to consult its principal, the people themselves, by a *referendum*;³ others have allowed this, while still denying the right to delegate to a sub-agent.⁴ All courts have allowed certain exceptions to the rule, such as a power to grant local self-government to municipalities, by immemorial usage,⁵ and a power to leave mere questions of detail to be worked out by the judiciary

¹ See *Hamilton v. Dillin*, 21 Wall, 73.

² *Wayman v. Southard*, 10 Wheat., 1, 42-3; *Bank of U. S. v. Halstead*, *id.* 51, 61; *In re Rahrer*, 140 U. S., 545, 560; *People's R. R. v. Memphis R. R.*, 10 Wall, 38, 50.

³ *Barto v. Himrod*, 8 N. Y., 483.

⁴ *Locke's Appeal*, 72 Pa. St., 491; *Cooley Const. Lim.*, 6th ed., pp. 140-46.

⁵ *Paul v. Gloucester County*, 50 N. J. Law, 585

or executive.¹ Moreover, as most statutes must be conditional, waiting for some given state of facts to exist to call them into operation, the power to decide whether or not that time has arrived must be delegated to the judiciary or to the executive.

This latter is, in fact, the judicial or executive province; but, like the exceptions above mentioned, it necessarily involves a really wide limit of quasi-legislative discretion. Still, if our courts have not been for a century in error, "there is a boundary somewhere between those great essential acts of legislative judgment, the power to perform which cannot be delegated, and those discretionary powers which may be. The Legislature could not, under the guise of enacting a conditional law, provide that whatever the President might thereafter enact or proclaim should have the force of law."² "It will not be contended that Congress can delegate to the courts, or to any tribunal, powers which are strictly and exclusively legislative."³ "The general proposition," says Solicitor-General TART, in his able brief for the government upon the McKinley Act, "that Congress has no power to delegate its legislative power to the Executive is conceded."

The Solicitor-General defends the act, first, upon authority of the brig *Aurora*, 7 Cranch, 362; second, by the claim that it follows a line of statutes, extending over a century of time, so unbroken and unquestioned as to constitute a practical construction of the Constitution which it is now too late to re-examine. We believe that neither of these defences is well founded, and that in fact the present question comes before us unaffected by precedent and to be decided simply upon its merits.

The brig *Aurora* came before the Court in 1813, under the Non-importation Laws of 1809 and 1810. We had become embroiled with both England and France, then hotly engaged in the greatest war of modern history. We claimed certain commercial rights as a neutral party. Eng-

¹ Wayman v. Southard, 10 Wheat., 1, 42-3; *In re Griner*, 16 Wis., 423.

² Paine, J., *In re Oliver*, 17 Wis., 681.

³ Chief Justice Marshall in Wayman v. Southard, 10 Wheat., 1, 42.

land and France denied the claim. The former by her Orders in Council, Napoleon by his Berlin and Milan Decrees, violated, as we claimed, our neutral commerce. It may have been true in international law that our claims were excessive and our rights doubtful. But as a matter of American law the case was clear. For the claims of the administration were well known, and in matters of international dispute it has been regarded as conceded that the courts must follow the lead of the political branch of the government.¹ When Congress and the President have spoken, it would ill become the judiciary to take the side of the foreigner. Under these circumstances the non-importation acts² were passed, closing our ports to the trade of our commercial enemies.

But these acts authorized the President, "In case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation," upon which trade should be renewed. That is, the President was simply made the judge, to find the fact and apply the well-recognized and then familiar rules of law. His proclamation, like the finding of a lunacy commission, was but the official evidence of the fact. It was not the less a judicial or executive, rather than a legislative act, because there could be no review of his decision by any other tribunal. He was no more a despot in this respect than was, until last year, the Federal Circuit Judge in a case involving a sum less than the \$5,000 necessary to warrant an appeal. It is common to leave such a question to an executive officer to decide, his decision being final.³ For this

¹ Chief Justice Marshall in *U. S. v. Palmer*, 3 Wheat., 610, 635; *Gelston v. Hoyt*, 3 Wheat., 246, 324 (recognition of Haytian insurgents); *Williams v. Suffolk Ins. Co.*, 13 Pet., 414, 420 (ownership of Falkland Islands); *Foster v. Neilson*, 2 Pet., 253, 307 (boundaries of Louisiana purchase); *Garcia v. Lee*, 12 Pet., 511 (do.); *Phillips v. Payne*, 92 U. S., 130 (cession of Alexandria from District of Columbia to Virginia); *Jones v. U. S.*, 137 U. S., 202 (ownership of Guano Islands).

² Acts of March 1, 1809; May 1, 1810.

³ *Martin v. Mott*, 12 Wheat., 19; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How., 272, 280.

reason, in the brig *Aurora*, the statute was sustained, as appears both by the briefs of counsel and by the opinion of the Court.

The distinction from the present statute is apparent. The President is now directed to impose duties upon the imports of any nation whose "exactions" on our products, "in view of" our rather modest free list, "he may deem to be reciprocally unequal and unreasonable." There is, and can be, no standard of comparison. It is impossible to formulate a rule, or anything nearer than a guess, as to the definition or the measurement of reciprocal unreasonableness. No court could pass upon such a question. The whole labored structure amounts but to saying that the President may impose the duties in his discretion as against any nation but one absolutely under the dominion of free trade. The discretion does not concern details alone, but the broadest principles of action. Its exercise is in every sense a legislative act.

Is there, then, such a uniform course of legislation as to justify so clear a departure from fundamental principles of government? Usage is indeed a powerful, sometimes a controlling, factor in constitutional discussions. But in the construction of statutes and constitutions, as of contracts, the usage given such effect has been long, continuous and generally acquiesced in.¹ Our history, on the contrary, shows four stages in the progress of retaliatory legislation; first, a form loose like the present, and for the time unquestioned; then a great debate over the right to delegate legislative power; then eighty years of precedents, beginning with the act of 1809 just quoted, in which correct rules were more or less strictly followed; finally, and with the past five years, a relapse into the first condition.

On June 4, 1794, Congress replied to the British Orders in Council by an act authorizing President WASHINGTON to lay a general embargo, "whenever in his opinion the public safety shall so require, . . . under such

¹ See *Cooley v. Board of Wardens*, 315; *Prigg v. Pennsylvania*, 16 Pet., 621; *Lithographic Co. v. Sarony*, 111 U. S., 53, 57; *The Lama*, 114 U. S., 411.

regulations as the circumstances of the case may require ;" to be laid, however, only during the recess, and to last only fifteen days after the next meeting of Congress. The act was passed unanimously, without discussion.¹ On February 9, 1799, and February 26, 1800, Congress passed, again without discussion upon this point,² acts giving like power to President JOHN ADAMS. On February 28 and December 10, 1806, acts were similarly passed, giving to President JEFFERSON temporary power to suspend the embargo in his discretion. All of these statutes were enacted hurriedly, in expectation of foreign war, and in times when Congress could not be called in extra session without two months' delay.³

The constitutional question was first raised, apparently, upon a bill enacted April 22, 1808, again authorizing the suspension of the embargo. A debate ensued in each house of Congress. The speeches in the Senate are not reported, but the bill seems to have been stoutly resisted as a delegation of legislative power.⁴ The discussion in the lower House is reported at great length. JOHN RANDOLPH, of Roanoke, led the opposition to the bill, but the legal arguments were supplied by the then famous lawyer, PHILIP BARTON KEY, of Maryland. Mr. KEY took the position of the present opponents of the McKinley law: "Let us say that when such events (designating them) happen, the law shall be suspended, and let the President give them publicity by proclamation." The contrary is "the most anti-republican doctrine ever advocated upon the floor of this House." "I do not say that we cannot give the President, upon certain predicated events, a power by which the embargo may be taken off. Such may be done." But if the President be left to "exercise his judgment" as to what events shall be sufficient, "it is the exercise of a legislative power."⁵ Mr. JOSIAH QUINCY, of Massachusetts, and others

¹ Annals of Congress, April 19, 1808, p. 2,230.

² Annals of Congress, April 14, 1808, p. 2,144.

³ *Id.*, Dec. 21, 1808, p. 295; April 19, 1808, p. 2,216.

⁴ *Id.*, Dec. 21, 1808, p. 259; Jan. 7, 1809, p. 315.

⁵ Annals of Congress, April 13, 1808, pp. 2,124-5; April 18, 1808, p. 2,212.

on both sides, argued that the question was not constitutional, but of expediency merely.¹ Mr. CAMPBELL, of Tennessee, who had charge of the bill, took a middle course, agreeing with the distinction taken by Mr. KEY, but claiming a wider range of discretion for the President.² The bill finally passed in a transitional form.³ The debate, however, called public attention to the danger of the earlier forms and future bills, beginning with that of 1809, conformed to the theory of Mr. KEY. A debate in the Senate the following winter⁴ seems to have ended the discussion, except in the case of the brig *Aurora*, until it was revived by Senator EVARTS over the bill of 1890.⁵

The Tonnage Act of March 3, 1815, may be taken as a type of those passed in this intermediate period. It first repeals every "discriminating duty on tonnage between foreign vessels and vessels of the United States." It then provides that the repeal shall "take effect in favor of any foreign nation, whenever the President of the United States *shall be satisfied* that the *discriminating or countervailing* duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished." For the phrase, "shall be satisfied," such expression as "upon satisfactory evidence being given to the President"⁶ is often substituted. This does not impart an untrammelled or quasi-legislative act of discretion, but is a term commonly used in relation to judicial proceedings. Illustrations of this will probably occur to all practising lawyers. "Satisfactory evidence" means "sufficient evidence."⁷ An applicant for a warrant of attachment in New

¹ Annals of Congress, April 14, 1808, pp. 2, 129-30; April 19, 1808, pp. 2, 200-2.

² *Id.*, April 13, 1808, pp. 2141-4.

³ "In the event of such peace or suspension of hostilities between the belligerent powers of Europe, or of such changes in their measures affecting neutral commerce as may render that of the United States sufficiently safe, in the judgment of the President of the United States, he is hereby authorized" to suspend the embargo till twenty days after the next meeting of Congress.

⁴ Annals of Congress, Dec., 1808; Jan., 1809, pp. 245-319.

⁵ Congr. Record, September 8, 1890, p. 9,882.

⁶ Act of January 7, 1824.

⁷ 1 Greenleaf on Evidence, § 2.

York must "make affidavit to the satisfaction of the judge granting the same,"¹ yet the decisions of the judges are reviewable, and in fact are constantly under review, upon appeal. So when one contracts to do a job to the satisfaction of another, the latter's decision must be reasonable; and it is subject to the regulation of a jury, except the job be such as the painting of a portrait or fitting of a suit of clothes, dependent entirely upon personal taste.² The question of disadvantage to the United States, within the meaning of the statute in discriminating or countervailing duties, is one that can be judicially solved. It is merely the question whether American vessels and their cargoes are treated as well by the foreign government as are those of its own citizens.³

The last of this series of constitutional acts was passed in 1886.⁴ The first of the present doubtful series was the Canadian Retaliation Act of March 3, 1887. This law is very objectionable in form,⁵ although supposed by its framers to follow the precedent of its predecessors, but is too recent to be valuable as a precedent, and has already been referred to with doubt by the courts.⁶ The constitu-

¹ N. Y. Code of Civil Procedure, § 636.

² Duplex Safety Boiler Co. v. Gardén, 101 N. Y., 387.

³ See also the following acts for various forms: Acts of March 3, 1817; March 1, 1823; January 7, 1824; April 20, 1826; May 24, 1828; May 21, 1830; May 19 and July 13, 1832; March 3, 1845; June 26, 1884. Special Acts of June 30, 1834, and March 2, 1839, relating to Cuba, Porto Rico and Belgium, are more objectionable in form; but the variation seems to have been unnoticed, and they never came up for judicial review.

⁴ Act of June 19, 1886.

⁵ "Whenever the President of the United States shall be satisfied that American fishermen in Canadian waters "are or then lately have been denied or abridged in the enjoyment of any rights secured to them by treaty or law, or are or then lately have been unjustly vexed or harassed in the enjoyment of such rights, or subjected to unreasonable restrictions, regulations or requirements in respect of such rights or otherwise unjustly vexed or harassed," he may (with certain discretionary exceptions), by proclamation, close American ports to Canadian craft and forbid the importation of Canadian goods, and "may in his discretion apply such proclamation to any or to all of the foregoing-named subjects," with power to revoke, etc.

⁶ Paul v. Gloucester Co., 50 N. J. Law, 585, 600.

tional objection was not pressed before Congress in 1887, but was raised at last over the McKinley Bill in 1890. Senator EVARTS, his instinct as a lawyer overcoming his allegiance as a party man, followed in the footsteps of RANDOLPH and KEY, showing that no authority had given the President the right "to enact arrangements of our revenue system upon his deliberation of what are fair and proper equivalents between nations in that regard," to make treaties without the Senate and pass revenue bills without the House. His amendment, however, that the President, instead of acting on his own discretion, should communicate the facts to Congress, was defeated by 34 votes to 30.¹

The question thus faces us unhampered by authority : Can Congress invest the President with its own full powers in the field of legislation, with no exception in favor of the exports of a country enjoying absolutely free trade? "There is perhaps no class of questions ever presented for judicial consideration which involve more real difficulty or leave greater room for the mind to remain in doubt than those which involve the boundaries between that legislative power which cannot be delegated, and those discretionary powers which the legislature may intrust to other departments or persons in the execution of the laws."² In the words of Chief Justice MARSHALL, "The line has not been exactly drawn. . . . The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law ; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate inquiry into which a court will not enter unnecessarily."³

Analogies favoring a practically boundless range of discretion may be drawn from the powers given to the President in times of war or of rumors of war. At such a time the nation's safety demands that the courts shall not interfere, nor will they do so, whether the war be with a

¹ Congr. Record, Sept. 8-9, 1890, pp. 9,882, 9,906.

² Paine, J., *In re Oliver*, 17 Wis., 681.

³ Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat., 1.

foreign enemy or with insurrectionary forces.¹ If a request is made of the President to call out the militia, the courts will not review the question whether the call came from the proper source,² or whether his acts as Commander-in-Chief were legal. His decision is judicial and final, as "necessarily results from the nature of the power itself; . . . a prompt unhesitating obedience to orders is indispensable."³ Some acts have gone very far in authorizing him in his discretion after war is begun, to regulate intercourse with hostile territory,⁴ or suspend the writ of *habeas corpus*.⁵ It may be doubted, however, whether these statutes are really operative at all; whether, as in the case of amnesty,⁶ it would not be held that he could do the same things without them. His commission as Commander-in-Chief comes direct from the Constitution, and has the widest scope in the realm of war and over conquered territory, while it is powerless to invade the rights of the citizen, except where necessities of war demand. Thus, by his own authority, he can establish provisional courts,⁷ or even organize governments and levy taxes⁸ in conquered districts, while away from the field of conflict Congress itself cannot give him the right to suspend the writ of *habeas corpus* as against suspected citizens.⁹

Analogous to war, however, in its sudden dangers and necessarily violent remedies, is the invasion of a contagious disease. It is not possible to guard against such a disaster except by giving to the Executive the fullest and quickest right of action. In this field the Constitution gives no direct commission to the President. His powers and those of the departments, given by acts of Congress, are legis-

¹ U. S. v. Lee, 106 U. S., 196, 209; Prize Cases, 2 Black, 635, 668-70, and cases *infra*.

² Luther v. Borden, 7 How., 1, 43.

³ Mr. Justice Story, in Martin v. Mott, 12 Wheat., 19.

⁴ Act of July 13, 1861; Hamilton v. Dillin, 21 Wall, 73.

⁵ Act of March 3, 1863. ⁶ U. S. v. Klein, 13 Wall, 128.

⁷ The Bark *Grapeshot*, 9 Wall, 129.

⁸ Cross v. Harrison, 16 How., 164; *Leitensaderfer v. Webb*, 20 How., 176.

⁹ *Ex parte Milligan*, 4 Wall, 1.

lative in their range of discretion as to diseases of men or animals. "In his judgment," he may allow importation of neat-cattle when there is no danger of disease.¹ When "satisfied that there is good reason to believe" that adulterated food, drink or drugs, "to any extent dangerous to the health or welfare of the people of the United States or any of them," are about to be imported, he may proclaim non-importation "for such period of time as he may think necessary."² We are not aware that those enactments have yet been brought to the bar to plead their constitutionality. It may, however, be that these powers will be sustained as being valid only so far as they impose upon him the duty to do what it is every man's right to do; that is, to abate a public nuisance.³

If, in other departments of legislation, Congress may delegate its legislative discretion as freely as in the department of public health, then Chief Justice MARSHALL was wrong, and JOSIAH QUINCY was right. Congress will consider merely the question of expediency. It should, indeed, exercise its greater latitude of constitutional interpretation to "avoid a measure because it approaches the confines of the Constitution ;"⁴ but if it fails in caution, there will be no remedy from the courts. The principle of the division between the three branches of the government will, in this respect, be regarded merely as a theory unworkable in practice, a visionary project into which our forefathers were led by their devotion to MONTESQUIEU, the political prophet of the eighteenth century.

But if Chief Justice MARSHALL was right—and there is a line beyond which the Legislature cannot go—still the question is one of expediency ; only in extreme cases will the Court as well as Congress have a right of judgment. The question will always arise whether, as in the case of the health laws, it is absolutely necessary to the public welfare that legislative discretion be delegated to executive officers.

¹ Act of March 3, 1866, R. S., § 2,494.

² Food Act of August 19, 1890, § 4.

³ Compare Wood on Nuisances, §§ 66-7.

⁴ Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat., 264.

Of the general rules, so far as rules will be found which may regulate the decisions upon these questions, it is, of course, impossible to treat. Each statute will be judged by its own provisions and by the circumstances which call it forth ; if it is impossible to carry on a safe and effective government without the delegation of power, then the delegation will be sustained.

But if the courts overrule the opinion of Chief Justice MARSHALL, and leave the question of expediency entirely to the legislature, then we are in a condition of theoretical, and, perhaps, soon may be in a condition of practical, danger. The tendency of the present time is toward the extension of executive power. This is fostered by the fact that in the nation, as in many of the States, the varying rates of growth between different portions of the country tend to increase the likelihood of the legislature remaining for long terms of years in the control of a minority party. Not only has the law tended toward a concentration of power in the hands of a single individual, but leaders in both the political parties, within a very short time, have shown a willingness and determination to grasp at authority without respect to the ancient traditions of our commonwealths. It is no idle speculation, therefore, to consider what may be done if Congress has the power to hand over its functions to a political leader of our new school of statesmen. Such speculations may easily be made, but are not practicable within the bounds of this article. A bill, actually introduced a few weeks since¹ in the United States Senate, by Senator TELLER, of Colorado, gives us a single instance. This bill, if enacted, will authorize the President to call together the nations of the world in conference upon the silver question, inviting the so-called "Latin Union" and such other nations as shall please him. If any three of these nations shall then agree with him as to the ratio between the silver and the gold dollar, he will have the authority to issue a proclamation fixing that value with the same conclusiveness as if it had been deliberately

¹January 11, 1892.

enacted by act of Congress. If he shall conclude it to be advisable for national or party purposes that the ratio of silver to gold should be twelve to one instead of sixteen to one, he need but invite Hayti, Costa Rica and the Transvaal Republic to his conference, and, by securing their adhesion, obtain the power to upset the financial standards of the United States. Many cases could be put in which the ruling party could, for a considerable time, perpetuate its power in a situation like that of the second session of the Fifty-first Congress. President, Senate and House of Representatives then belonged to the same political party, and had it in their power to make the laws. They knew that on the fourth day of March then next ensuing the opposition would obtain control of one branch of Congress, so that for two years party legislation would be impossible. If a Congress has an unlimited right of delegation, a series of acts could easily, and might in the future, perhaps, not improbably, be passed, which should secure to the President the right of legislation during those two years; while the ensuing Congress would simply and easily, by the ordinary parliamentary processes, be stifled in a deadlock.

Thus the power to delegate involves the power to create a limited dictatorship. Such considerations are of grave importance in passing upon a constitutional question. They are not, however, entirely conclusive. "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse."¹

It is possible, indeed probable, that the question will not be settled upon the present consideration of the McKinley Act. The President has as yet issued no proclamation under his retaliatory powers. The point has been taken in the Federal Supreme Court by importers of wearing apparel, whose claim is that the whole tariff legislation is void on account of the alleged invalidity of this one clause. It may, perhaps, be that the bill would not have passed the Senate if it had not been for this concession to

¹ Mr. Justice Story, in *Martin v. Mott*, 12 Wheat., 19.

the principles of free trade. It was charged by an influential leader and by a section of the followers of the party which advocated the measure that without this clause the bill would not have found a new market for a single bushel of American wheat or a single pound of pork. Whether or not, however, the bill was carried through by this provision will never be known; nor, could it be known, would the court consider such an argument for the purpose of overthrowing the bill's constitutionality. The question whether the reciprocity clause is separable from the rest of the act is one of law, not of history. To decide the question in the affirmative might be judicially to accomplish a fraud upon the Senators and their constituents; but many frauds go unpunished in this world and even (if the instigator duly repent) in the next.

If the President proclaims a tax upon the exports of any foreign country, under the provisions of this measure, its constitutionality will doubtless be disputed, and the question at last come before the Supreme Court for decision. If our arguments are well founded, that court will not be able to sustain the measure without overthrowing all vestiges of the ancient principle that legislative power cannot be delegated, unless the position be taken in analogy to the decisions of the courts in the boundary cases and others which we have cited, that for the credit of the Federal Government in its dealings with foreign countries, no act will be pronounced unconstitutional upon whose constitutionality the President has based diplomatic negotiations. There would be analogy for such a decision in the cases cited. But even in foreign relations the scope allowed him has not been unlimited. When President JOHN ADAMS assumed, in excess of the powers granted him by the Non-intercourse Act of 1799, to stop importations in foreign vessels, Chief Justice MARSHALL, and the Supreme Court, after grave hesitancy, decided that his orders were void and afforded no protection to the naval officers who acted under them.¹

¹Little v. Barreme, 2 Cranch, 170.

We have attempted to state the main considerations upon which the Supreme Court will base its decision, whenever and on whichever side the decision is reached. In such a region of mingled law and politics it seems impossible to do more.

New York, February 2, 1892.

NOTE.

Since the preceding article was put in type, the Supreme Court has handed down a decision affirming the validity of the McKinley Act in this respect among others. The opinions are not yet at hand. Chief Justice FULLER and Mr. Justice LAMAR appear to take the view maintained here, while the rest of the Court, speaking by Mr. Justice HARLAN, consider that the President is not vested by the act with any real legislative power, but is left to ascertain that a particular fact exists. Until the opinion of the Court is handed down in full, it will be difficult to say in what cases legislative discretion may hereafter be held to be delegated.
—E. B. W.

HIGH COURT OF JUSTICE—PROBATE DIVISION. THE AUGUST.

SYLLABUS.

A German vessel, loading at Singapore for London, took on board, with other cargo, a quantity of pepper shipped by British subjects, under English bills of lading in the usual form. On the voyage, heavy weather was experienced, and the vessel put into a port of distress, both the ship and portion of the cargo being damaged. The master telegraphed to this effect to the ship's agent at Singapore, and the contents of the telegram were communicated to the various shippers, but no instructions were received by the master. Thereupon the master, acting in good faith on the best advice he could obtain, and believing it to be for the benefit of the cargo-owners, sold, with other cargo, a considerable portion of the pepper, much of which might have been reshipped, and some of which was, in fact, sent on by the purchasers in other vessels to London, where it fetched substantially the price of sound pepper.

In an action for breach of contract and conversion, brought by the plaintiffs, who were the consignees of the whole, and the purchasers of part of the pepper so sold by the master :

Held, that the defendants, the owners of the vessel, were not liable, as the law of the flag must be looked at to determine the propriety of the sale, and by German law the conduct of the master was justifiable.

Action for non-delivery of goods.

The facts are as stated in the syllabus.

OPINION OF THE COURT.

SIR JAMES HANNEN, President, after stating the nature of the action, proceeded : This action is brought in respect of the pepper sold at Cape Town as damaged, it being contended further for the plaintiffs that such sale was not necessary or justifiable.

The defendants pleaded that the *August* was "a German vessel, and entitled to fly the German flag, and to all the privileges of a German ship; and that the defendants and charterers of the said ship were German subjects, resident in Germany; and that the master was a German subject; and that the charter party was a German contract; and that the contracts contained in the bills of lading for the carriage of the said pepper were made and entered into subject to German law; and that by the German law . . . the sale of the said goods was lawful and right."

The question raised by this plea was first argued before me, it being agreed that the other questions arising in the case should stand over until I had determined whether the propriety or impropriety of the conduct of the captain in selling the pepper alleged to be damaged was to be determined by English or German law.

The broad distinction suggested to exist between the English and German law on the subject under consideration is, that by the English law it is not sufficient to justify the sale of the goods at a port of refuge, that the captain acted in good faith and in the exercise of the best judgment he could form, if it should be held by the tribunal before which the question may come that there was not in fact a real necessity for the sale; whereas, by the German law, the sale will be justified if the captain, after taking the best advice he can obtain, honestly comes to the conclusion that a sale is best for the interests of the persons for whom he is called upon to act in the emergency which has arisen.

This is not given as a complete statement of the German law on the subject, but merely as an indication of the nature of its difference from the English law for the purposes of the present inquiry.

The argument for the defendants is based on the principle laid down by the Court of Exchequer Chamber in *Lloyd v. Guibert*,¹ that where the contract of affreightment does not provide otherwise, as between the parties to the contract in respect of sea damages and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

In the very learned judgment in that case, delivered by WILLES, J., on behalf of the Exchequer Chamber, he says (p. 129): "Exceptional cases, should they arise, must be dealt with upon their merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect to sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and, therefore, most convenient to those engaged in commerce."

This subject has since been very fully considered by the Court of Appeal in the case of the *Gaetano and Maria*.² In that case goods were shipped by British subjects under a charter party made in London for the carriage of goods to England in an Italian ship. The ship put into Fayal in distress, and the master entered into a bottomry bond, by which he hypothecated the cargo as well as the ship without communicating, as he might have done, with the cargo-owners, but which, by the Italian law, he was not bound to do. The question was whether the captain was bound by the English law, by which he had no authority to bind the owners of the cargo without communicating with them; or by the Italian law, under which such communication was unnecessary.

The present Master of the Rolls, in giving judgment in that case, says (p. 146): "What is the principle which ought to govern the case? The goods are put on board an Italian ship, and the person to exercise authority is an Ital-

¹ Law Rep., 1 Q. B., 115.

² Law Rep., 7 P. D., 137.

ian master. Is the authority of the Italian master to depend upon the law of the country of the shipper, when the law is contrary to the law of his own country? Why should it? Is the master of the ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so. If a merchant puts his goods into the power of an Italian master on board an Italian owner's ship, what is the meaning of the transaction but that he is to deal with goods on board his ship, unless he is bound to another mode? Upon principle, it seems to me that he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary."

And after reviewing the facts of the case of *Lloyd v. Guibert*,¹ and pointing out that there the contract was one of affreightment, he continues: "Still, if the contract was there held to be a foreign contract, because it was made with regard to the shipment of goods on board a foreign ship, the principle governs this case, and would authorize our saying that the authority which arises out of the contract of shipment is the authority which the law of the country of the ship would give to the master."

And COTTON, L. J., thus states the principle applicable (p. 149): "When the owner of goods puts them on board a vessel, he must authorize the owner of that vessel, and his agent, the captain, to deal with those goods according to the law of the country to which that vessel belongs." This "rule is applicable, because no one who ships goods on board a vessel can be ignorant of the flag—that is, of the country to which the ship belongs—whilst the master would be in a very difficult position if he had to inquire what was the law of the country of the goods if, as regards one portion of the cargo, he had power to deal, when the necessity arose, in one way, and as regards another portion of the cargo in another way."

This appears to me to be binding authority in the

¹ Law Rep., 1 Q. B., 115.

present case, unless a valid distinction can be drawn between the law which is to govern the right of a master to hypothecate cargo and that applicable to his right to sell it in circumstances of emergency. I can find no such distinction, and it will have been seen that the passages I have quoted from the judgments in *Lloyd v. Guibert*¹ and the *Gaetano and Maria* are perfectly general, and apply with equal force to the case of a master called upon in a position of difficulty to determine whether he should sell goods as to that of one having to determine whether he should pledge them.

It was urged also for the plaintiffs that a later case in the Court of Appeal, the *Chartered Mercantile Bank of India v. Netherlands, India, etc., Co.*,² modified the decision in the *Gaetano and Maria* and supported their contention. I am of opinion, however, that it has no such effect. There is no such suggestion throughout the judgments there delivered that there was any intention to vary the law as laid down in the earlier cases I have cited. There, goods were shipped under a bill of lading containing, amongst other excepted risks, "collision." In the course of the voyage the carrying ship came into collision with another vessel belonging to the same owners, both ships being to blame. It was a question in dispute whether both were Dutch. It was held that, whether they were Dutch or not, the defendants were liable in tort for the negligence of their servants on board the ship with which the carrying vessel collided. This case does not appear to me to throw any light on the one now under consideration. It was held in that case that the contract was English, even though the ship in which the goods were carried was Dutch. Assuming that the contract in the present case was English, that does not govern the question of what law is to be applied to goods carried in a German ship, a state of facts not provided for and not contemplated by the contract having arisen. Such facts existing, we must consider what

¹ Law Rep., 1 Q. B., 115.

² 10 Law Rep., Q. B. D., 521.

law it is just to apply to these exceptional circumstances, and, for the reasons so forcibly stated in *Lloyd v. Guibert* and in the *Gaetano and Maria*, it appears to me that the master of the *August* could only be expected to act in conformity with the law of his flag.

Holding, therefore, as I do, that the captain, in dealing with the damaged cargo at the port of distress, was entitled to act in accordance with German law, I proceed to consider what is the German law applicable to such a case.

(After reviewing the German law at length, the learned judge held that it absolved the master and owners of the ship from liability for the sale, and judgment was directed for the defendants.)

THE LAW OF THE FLAG.

The foregoing case is the latest application of that canon of construction, commonly designated as the "law of the flag," which has been adopted by the English courts in cases involving the relations arising from a contract by charter party or bill of lading, where, either owing to the diverse nationality of the parties, or other circumstances connected with the transaction, there is no conclusive presumption as to the municipal law to which recourse must be had to determine the rights of the parties.

Mr. FOOTE, in his work on *Private International Law*, page 408, states that the law of the flag is "to regulate the liabilities and regulations which arise among the parties to the agreement, be it of affreightment or by hypothecation, upon this principle; that the ship-owner who sends his vessel into a foreign port gives a notice by his flag, to all who enter into contracts with the shipmaster, that he intends the

law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all."

While the rule, thus broadly stated, has never been judicially recognized in this country, but, on the contrary, has been repudiated when it has come before the courts for consideration, there can be no doubt but that, when a case shall arise which shall call for its application within its proper limits, the courts of this country will follow it.

The Nature of the Rule.—Until within a comparatively recent time the prevailing doctrine was that the recognition and enforcement of a foreign municipal law were based upon the comity prevailing among nations, and even at the present time that theory is not without its adherents. (See remarks of Judge BROWN, in the *Brantford City*, 29 Fed. Rep., 373 to 383.)

The current theory, however, is that the force of a foreign municipal law is in no wise due to a spirit of comity, but depends upon the intention of the parties, which, when ascertained, must be enforced as a matter of right. Considered as a foreign law, it can have no extra territorial effect, and none can be conferred by comity; but, viewed as a stipulation, which the parties to a contract have impliedly incorporated into it by submission to the law of such foreign country, it occupies precisely the same position as any other provision of the contract, and the Court which refuses to enforce such foreign law, unless it involves the violation of the public policy of the country, clearly violates the duty imposed upon it. Substantively, foreign law is exactly what it has always been regarded as a matter of procedure. It is simply a fact. It stands upon the same footing as the contract itself. It must first be shown that the parties intended to be bound by a contract, and, when that is done, the provisions of that contract must determine the rights of the parties; and so, when it is proved that the parties intended to submit to a foreign law, that law must determine their rights.

The grounds upon which a foreign municipal law is enforced and that upon which a local municipal law is enforced are identical. It is the consent of the parties in both instances which entitles the Court to give force to the law. There is this distinction, however: where no questions of public policy are concerned, it is undoubtedly true that the parties owing allegiance to the same municipality may waive the provisions of the local municipal law and provide otherwise; but such

waiver must be clearly expressed, or there will be conclusive presumption that by reason of their allegiance to the government the parties have consented to be bound by the terms of the law. Where there is diverse citizenship, no such presumption can arise, and the question of the intention is an open one.

Where there is no evidence of the intention, the presumption generally is that the parties intend to submit themselves to the law of the place where the contract is made: *P. & O. Co. v. Shand*, 3 Moo. P. C. (N. S.), 272; *the Montana*, 129 U. S., 397; *Jacobs v. Credit Lyonnais*, 12 Q. B. D., 589. Lord MANSFIELD thus stated the law in *Robinson v. Bland*, 2 W. Black, 258 (1760): "The general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered, in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of the making of the contract) had a view to a different kingdom."

But in England, at least, the tendency is, in cases of affreightment, toward a different presumption. Mr. SCRUTTON, in his work on *Charter Parties*, etc., p. 11, after referring to the above rule, says: "It is submitted that, in the absence of any express indication of intention as between the parties to a contract of affreightment, there is a strong presumption in favor of the law of the ship's flag."

That this presumption is not, in England, conclusive is shown by the case of the *Chartered Mercantile Bank of India v. the Netherlands India Steam Nav. Co.*, 10 Q.

B. D., 521, where an English merchant shipped goods at an English port to be carried to a Dutch port, in a ship registered in Holland and carrying the Dutch flag, belonging to a company registered in Holland and also in England as an English stock company. The bill of lading was in English. It was held in the Queen's Bench and in the Court of Appeals that these facts were sufficient to overcome any presumption in favor of the law of the flag, and showed that it was the intention of the parties to be governed by the law of England. BRETT, L. J., said: "It may be true, in one sense, to say that where the ship carries the flag of a particular country, *prima facie* the contract made by the captain of that ship is a contract made according to the laws of the country whose flag the ship carries. But that is not conclusive."

Accepting the intentions of the parties, then, as being the crucial test of the law which applies in each particular case, it becomes evident that the law of the flag of the ship is no more than an element, to be considered in conjunction with all the other facts of the transaction in ascertaining the true intention of the parties. As to its relative weight in determining this question no inflexible rule can be established. In some instances its preponderance appears to be so great as to amount almost to a conclusive presumption. In other cases it may be outweighed entirely by the other facts.

This rule has been applied in two classes of cases: first, those involving its effect upon the authority of the master; and, second, those involving the validity of contracts of affreightment.

The first may be subdivided into those applying to the authority of the ship-owner, either by way of hypothecation or affreightment; and, second, the authority of the master over the cargo.

(1) *Effect of the Law of the Flag upon the Authority of the Master.*

(a) To bind ship-owner by way of hypothecation or affreightment.

The exception of bottomry bonds from the general rule, that the *lex loci contractus* prevails, seemed anomalous to the writers on the conflict of laws.

MR. MACLACHLAN, in his treatise on Merchant Shipping, published in 1860, suggested that the explanation of this might be found in applying the law of the flag of the ship. "The agency that we speak of here is devolved upon him by the law of his flag. The same law that confers this authority ascertains its limits; and the flag at the mast-head is notice to all the world of the extent of such power to bind the owners or freighters by his act" (3d ed., p. 170).

He further says: "Is the foreigner who deals in his own country with this agent bound by that law (of the flag)? First, he has notice of it, and therefore if he be, there is no injustice.

"The notice of which we have spoken is to be found in the national flag that he hoists on every sea and sails under into every port. Agents under the municipal laws, even within the bounds of municipal jurisdiction, bear no such public credentials. Moreover, his command on board, the ship's papers, and all the circumstances that connect him with the vessel, isolate the vessel in the eyes of the world, and demonstrate his relation to the owners and freighters as their agent

for a specific purpose, and with power well defined under the national maritime law" (p. 170).

This rule was followed, in 1864, in the leading case of *Lloyd v. Guibert*, 1 Q. B., 115. In that case the plaintiff was a British subject, who had chartered a vessel carrying the French flag, at St. Thomas, a Danish West India island, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option. The ship was chartered by the master in pursuance of his general authority. The vessel belonged to French subjects, domiciled and trading in France, and the charter party in the French language described her as French. A cargo was shipped at St. Marc for Liverpool, and the vessel sailed with it; but she was compelled to put into Fayal, a Portuguese port, in distress, and, in order to repair, the master borrowed money upon bottomry upon ship, cargo and freight. On arrival at Liverpool the ship and cargo were insufficient to pay the charge, and it fell to the cargo-owner, who claimed to be indemnified by the ship-owners.

By the laws of France there was no personal liability of the ship-owners, and the case turned upon what law was applicable. It was held by the Queen's Bench, and afterward upon appeal by the Exchequer Chamber, that neither the Danish law (the law of the place of contract) nor the law of Hayti (where cargo was loaded), nor the Portuguese law (where bottomry was given), nor the law of England (as the place of performance), were intended by the parties to apply, but that all the facts showed that they intended to submit to the law of the flag. In the Queen's Bench, BLACKBURN, J., followed directly

the rule laid down by Mr. MACLACHLIN, holding that the master had no greater authority to bind the ship-owner than was conferred by the law of the ship. He said:

"We think that, as far as regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master's authority is that conferred by the law of the flag; that his mandate is contained in the law of that country, with which those who deal with him must make themselves acquainted at their peril" (33 L. J. Q. B., 248).

Upon appeal, in the Exchequer Chamber, the decision was placed upon a broader ground. After an elaborate discussion, it was held that neither the English, Portuguese or Haytien laws had any application, and that the considerations in favor of the Danish law were outweighed by those in favor of the law of the flag of the ship.

The ground of the discussion in the Court of the Queen's Bench, that of the limitation of the authority of the master, was not considered in the Exchequer Chamber, the Court being of opinion that by entering into the contract of affreightment the parties intended to be governed by the law of the ship as to all questions of sea damage. Said WILLES, J.:

"The general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce."

The same question had already been before the courts of this country, and different decisions had been rendered, none of them being exactly in accord with *Lloyd v. Guibert*.

In *Pope v. Nickerson*, 3 Story, 465, exactly the same question arose. The schooner *Anawan*, owned by citizens of Massachusetts, took on board at Malaga a cargo consigned to Philadelphia. She put into Bermuda in distress, and there the master executed bottomry upon ship, cargo and freight. The question arose whether there was any personal liability of the ship-owner. By the law of Pennsylvania, such personal liability existed, but by the laws of Massachusetts and Spain it did not exist. Judge STORY held that the law of Massachusetts, being the law of the domicile of the owners, prevailed. He said :

“But what I wish to rely on is the fact that the master has no power to bind the owners beyond the authority given to him by the owners; and that, from the nature of the case, the extent of that authority, is the law of the country where the ship belongs and they reside, for it is there that the authority is given, and there it is to be interpreted. If, by the law of the domicile of the ship and of the owners, the authority of the master is limited to the ship and freight, and does not, in the absence of express instructions, bind the owners personally, it seems difficult to understand how resort can be had to the law of a foreign country, unknown and unsuspected (it may be) by the owners, to expand that authority to the positive creation of personal obligations on the part of the owners, and that, too, according to the law of every successive country which the ship may

visit in the course of a circuitous voyage.”

In *Malpica v. McKeown*, 1 La., 249, a question arose as to the liability of the ship-owner for property on board the ship belonging to a passenger which was lost. The point was made that, as the passenger and property were taken on board at a foreign port, the law of that place, and not that of the place of residence of the ship-owner, should determine his liability. PORTER, J., said, in deciding that the *lex loci contractus* prevailed :

“We are of the opinion that the law of the place of contract, and not that of the owner's residence, must be the rule by which his obligations are to be ascertained. The *lex loci contractus* governs all agreements unless expressly excluded, or the performance is to be in another country, where different regulations prevail. What we do by another we do by ourselves; and we are unable to distinguish between the responsibility created by the owner sending his agent to contract in another country and that produced by going there and contracting himself.”

The same question again arose in that State, in *Arayo v. Currel*, 1 La., 528, and a similar conclusion was reached.

MARTIN, J., said : “If this question turned on the master's having exceeded his powers, we are inclined to think that, as the general rule authorized him to bind the owner to the extent contracted for, the plaintiff who contracted with him was unaffected by a limitation in a statute of another country, of which he could not be presumed to have any knowledge, and to the authority of which he was not subject.”

(b) To control the cargo.— This question is closely allied to the last one, and the same rule applies:

"Whoever puts his goods on board of a foreign ship to be carried, authorizes the master to deal with them according to the laws of the ship's flag, unless that authority is limited by express stipulation between the parties at the time of the agreement." Scrutton on Charter Parties and Bills of Lading, page 11.

In the *Gaetano and Maria*, L. R. 7 P. D., 137 (1882), a charter party was entered into in London for the charter of an Italian ship. Goods were shipped under this contract in New York. The vessel put into Fayal in distress, and while there borrowed money upon bottomry of ship, freight and cargo, without communication with owners, as required by the law of England. In a suit upon the bottomry bond the cargo-owners defended and alleged that it was invalid, as it was made without communication. It was held that the law of Italy, which did not require communication, was applicable.

BRETT, L. J., said: "What is the principle which is to govern this case? The goods are put on board an Italian ship, and the person to exercise authority is an Italian master. Is the authority of the Italian master to depend upon the law of the country of the shipper, when that law is contrary to the law of his own country? Why should it? Is the master of a ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so: If a merchant puts his goods into the power of an Italian master, on board of an Italian owner's ship, what is the meaning of the transac-

tion but that he is to deal with the goods as an Italian master is to be taken to deal with goods on board his ship, unless he is bound to another mode? Upon principle it seems to me that he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary."

In the *Bahia*, Br. & L. 38, Dr. LUSHINGTON held, in a case where cargo was shipped on board a French ship, that all questions relating to transshipment were to be determined by the law of the ship.

Although the question has not yet been determined by our courts, it seems most probable that the law of the flag would be followed to its proper limit, that is, to questions concerning the right of the master to bind the ship-owner, either by hypothecation or by implied stipulations in contracts of affreightment limiting the liability of the ship-owner, and also to all questions in reference to the power of master over cargo.

It seems, too, that questions of the right of the ship-owner to recover pro rata freight are to be governed by the law of the flag: Lowndes, on General Average, p. 229. The question was raised in *Nat. Board of Underwriters v. Melchers*, 45 Fed. Rep., 543, but its decision was unnecessary under the facts of that case.

It will be observed that in the case of *Pope v. Chickerson*, Judge STORY approached very closely to the doctrine of the "law of the flag." But to have applied that law to that case would have left the case undecided. The flag was American, but by referring to that country, owing to our peculiar sys-

tem of government, there was no uniformity in the law upon this subject, and therefore some further test was necessary.

(2) *The Effect of the Law of the Flag upon the Validity of the Contract of Affreightment.*—In the *Missouri Steamship Company*, 42 Ch. Div., 321 (1886), this rule was widely extended. In that case a contract was made in Boston, between an American citizen and the agent in Boston of a British steamship company, for the transportation of certain cattle in the *Missouri*, a British ship. The contract contained a provision that the company should not be liable for negligence of the master or crew. Such a provision was valid by the English law, but invalid by that of the United States and Massachusetts. The cattle were lost by the negligence of the master and crew. CHITTY, J., held that the English law, as the law of the ship, showed that it was the intention of the parties to submit to the English law. He said: "I have referred somewhat fully to this judgment (*Lloyd v. Guibert*) in order to show that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable, and ought to be applied, not merely to questions of construction arising out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinctions founded on the difference of these questions were not rested on substantial grounds, and would lead to uncertainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only,

namely, that of the flag; and so to hold is to adopt a simple, a natural and consistent rule."

Upon appeal, however, while the decision was affirmed, the Court, evidently, did not go quite so far. Lord HALSBURY, L. C., said: "Now this is a contract for the conveyance of cattle from Boston to England by sea, on board a British ship, by a British company whose domicile is in England. These circumstances, though very strong, would, perhaps, not be conclusive. But when I look at the contract itself and find that the ordinary exceptions to the bill of lading are the Queen's enemies and so on, it is absolutely impossible to resist the conclusion that the parties did contemplate being governed by the English law in their contracting relations." The effect of the use of the words, "Queen's enemies," is shown in the principal case to mean only the enemies of the ruling power, which might have been that of America or of England. The learned judge was also of the opinion that, as one of the provisions only, and not the entire contract, was void by the law of Massachusetts, where it was made, that it would be enforced by the English courts.

In the United States directly opposite conclusions have been reached.

In the *Brantford City*, 29 Fed., 373, decided in D. C. U. S., S. D. of N. Y., in 1886, the facts were almost identical with those in the *Missouri*. Judge BROWN held that the law of the United States should prevail. It may be doubtful whether the point was actually involved in that case, as the facts tend to show that the proximate cause of the damage was the defective

ittings of the steamship, amounting to unseaworthiness, which was not one of the exceptions of the bill of lading: *Steel v. State Line S. S. Co.*, 3 App. Cases, 72; the *Huaji*, 16 Fed. Rep., 861; *Tattersall v. Steamship Co.*, L. R., 12 Q. B. D., 297. Referring to the law of the flag, he says: "The 'law of the flag,' so called, which, it is urged, should govern this case, does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs and whose flag she bears, whether it accords with the general maritime law or not. In so far, however, as the law of the flag does not represent the general maritime law, it is but the municipal law of the ship's home."

In the *Titania*, 19 Fed. Rep., 101 (1883), the same judge held that in the case of a shipment from Dundee to New York, on board a British vessel, the English law should govern in respect to damages upon the high seas. He said: "The shipment being made in England, and upon an English vessel, the law of the flag should govern." In the *Oranmore*, 24 Fed., 922, there was an express provision that any question under the bill of lading should be determined by the English law. In the District Court of U. S., D. of Maryland, Judge MORRIS held that the English law should govern. Considering that case in connection with the decisions of the courts of this country, it is questionable whether there was not merely an attempt to evade the decisions in reference to liability for negligence. But the question was not raised.

This question came before the

Supreme Court of the United States in the *Liverpool and Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U. S., 397 (1889) (the *Montana*). There, a contract was entered into in New York by a resident of New York with the agent of a British company for carriage of certain property to Liverpool. The bill of lading contained the usual clause, exempting the company from negligence of master and crew. The property was shipped on the *Montana*, carrying the English flag, which was lost through the negligence of the master and crew.

The Court held that the law of this country, as the *lex loci contractus*, must prevail, and that the exemption clause was invalid.

Mr. Justice GRAY said: "This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

An examination of these cases demonstrates that the American courts will not, from the mere fact that goods were shipped on an English vessel, assume that the contract is an English one.

The question is not free from

doubt, and it is probable that patriotic motives had some effect in both cases.

In some respects the American rule, to prefer the *lex loci contractus*, seems to have more to support it. Take the following case:

If goods should be shipped at an English port in an American ship, under a contract made with ship's agent at that place, and incorporated into the bill of lading was the clause that the owner should not be liable for negligence of master and crew, it does not seem probable that the English courts would hold that the shipment of the goods on the American vessel would make the contract an American one. They would probably discover some facts to show that it was the intention of the parties to submit to the English law.

Upon principle, the case of the *Missouri* appears to be in conflict with other English cases.

In *P. & O. v. Shand*, 3 Moo. P. C. (N. S.), 272; 12 L. T. N. S., 808 (1865), the plaintiff paid one entire sum for his passage from England to Mauritius by a ship of the defendant company, and signed a ticket stating that he accepted the conditions printed thereon, one of which was that the company would not be responsible for loss of the luggage of the passengers. Some of the plaintiff's luggage was last seen at Suez, in the company's possession, and was not afterward to be found. In an action to recover its value, the Supreme Court of Mauritius held that the French law, which there prevailed, should govern. Upon appeal, the Privy Council reversed that Court's holding that the liability of the company was to be determined by the law of England, as the *lex loci contractus*. TURNER, L. J., said: "The

general rule is that the law of the country where a contract is made governs as to the nature, the obligation and interpretation. The parties to a contract are either the subjects to the power there ruling or, as temporary residents, owe it a temporary allegiance; in either case, equally they must be understood to submit to the law there prevailing, and to agree to its action upon the contract."

In the recent case of *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. D., 589, the defendants, a London firm, contracted in London to sell to the plaintiffs, London merchants, a quantity of Algerian exports, to be shipped by a French company at an Algerian port, on board vessels to be provided by the plaintiffs in London. The contract also contained provisions in regard to shipment by steamer from Algiers, and the plaintiffs were required to approve and accept the exports as put on board in that country.

In the Court of Appeals, BOWEN, L. J., remarks: "Certain presumptions or rules in this respect have been laid down by judicial writers of different countries and accepted by the courts, based upon common sense, upon business convenience, and upon the comity of nations; but they are only presumptions or *prima-facie* rules that are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of the country where the contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties.

"Again, it may be that the contract is partly to be performed in

one place and partly in another. In such a case, the only certain guide is to be found in applying sound ideas of business, convenience and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties.

"Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by the English law, or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to the English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which, in modern times, we have to deal."

The rule suggested by Mr. Carver (*Carriers*, page 218), that where there is a division of carriage the parties may intend to be bound by one law as to one part and another law as to another part, does not seem to solve this question.

He puts the following case: "An agreement is made between Americans for the carriage of cotton, under a through bill of lading, from a place inland in the United States to England, say by rail to Philadelphia, and thence by steamer belonging to an English line, It may well be supposed that the law of the flag was meant to govern the contract as to the latter part of the transit, although as to the first part

there would be little doubt that the American law would determine its effect."

Change the facts of this case slightly, and supply, instead of an English line of steamships, a line composed of American and English ships. How can there be any presumption of the intention, that the law of the flag was intended to govern in such a case?

The shipper at the inland point does not know whether his cotton will be carried on an English or an American ship.

It certainly is not true that a stipulation in a bill of lading, that the ship-owner shall not be liable for the negligence of the master and crew, is to be void or valid by the fact that the cotton is shipped on the American or English ship, a fact of which the shipper has no knowledge whatever.

The *lex loci contractus* has better support. In a contract for carriage the agreement is made at one place for delivery in another. It is evident that the customs of the place of delivery must govern the manner of delivery. That would seem to be the only application of the law of that place. Generally, the manner of carriage is an immaterial question and does not affect the contract.

Two facts only are of importance—the delivery of the goods to the carrier, and the delivery by the carrier to the consignee. The method of carriage is, generally speaking, immaterial. If there is right delivery the law is satisfied. Why, then, should an immaterial fact determine the relations of the parties to the contract and decide whether a provision of the contract is valid or invalid?

HORACE L. CHEYNEY.

Philadelphia.

EDITORIAL NOTES.

BY W. D. L.

TILDEN v. GREENE.—The annotation of the case involving the validity of Mr. Tilden's will, which appeared in the February number of the *AMERICAN LAW REGISTER AND REVIEW*, has received wide and favorable notice from prominent members of the bar. The editors take this opportunity of stating that the annotation was written by Howard Wurts Page, Esq., of the Philadelphia bar. His signature to the annotation was omitted through the carelessness of the printer.

MR. JUSTICE BRADLEY.—The death of Mr. Justice Bradley has removed from the Supreme Court one of the few men who will live in the constitutional history of our country. To him, as much as to any other member of the bench, we are indebted for much of the recent development of constitutional law, especially in its application to complicated commercial questions growing out of the "Commerce Clause." The editors regret that lack of space prevents them in this number from entering into any extended review of his work on the bench. Such a review will appear in the April number of the magazine.

RAILWAY CO. v. STATE OF MAINE: A PROTEST.—The fascination of the study of the development of our constitutional law lies in the gradual and logical unfolding of principles. The result is a body of law that has made the Court, which has been and still is creating and applying it, the admiration of the civilized world. It is seldom that a principle, well established, the expediency of which has been tested for many years, and affirmed in innumerable cases, is weakened, if not temporarily destroyed, by a decision of that Court. Such a decision the student reads

almost with a feeling of pain. For the moment study seems to have been thrown away; he is unable to determine how far that which he believed to have been settled is unsettled, or even to surmise what will be the next change in that law, the wise development of which is vital to the welfare of his country.

Since the case of *Hinson v. Lott*¹ decided that a State could tax an import from another State, provided it placed the same tax on its manufacture within the State, no decision of the Supreme Court seems to be fraught with more far-reaching consequences than that of the State of Maine *v. Grand Trunk Railway Company*,² decided December 14, 1891. A law of the State required every railroad, for the use of its franchise, to pay a tax whose amount depended on two factors: first, the proportion of its lines within the State to the total mileage of the company; second, the amount of the gross receipts of the road. These receipts are derived almost exclusively from the transportation of the interstate and foreign freight. The Court held the tax constitutional, because, in the words of Mr. Justice FIELD, it is "an excise tax upon the defendant corporation for the privilege of exercising its franchise within the State."

The late Mr. Justice BRADLEY, Justices LAMAR, HARLAN and BROWN dissented. The dissenting opinion, written by Mr. Justice BRADLEY, appears in the reports as the last official words of that great jurist. Its conclusion is a vigorous protest against that policy adopted by State legislatures which fastens all the burdens of government on the business of transportation. Concerning the decision of the Court, he says: "Justices Harlan, Lamar, Brown and myself dissent from the judgment of the Court in this case. We do so both on principle and authority—on principle because, whilst the purpose of the law professes to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional."

¹ 8 Wall, 148.

² 142 U. S., 217.

If there has been one rule of law which has been heretofore considered as finally determined apparently beyond the possibility of a doubt, it is that a tax falls upon that upon which its amount is graded. This is the cardinal rule of the law which, while not always explicitly recognized, has lain at the foundation of all the decisions touching the power of the State to collect taxes from corporations engaged in interstate commerce. That a State has the right to tax the capital stock, the property of corporations, or to charge for its franchise is undoubted ; but the way in which the State can exercise this right has of late been curtailed by the salutary rule, that a tax is void which, in reality, falls on interstate or foreign commerce. The name which the legislature gives to the tax has always been considered immaterial. Thus, except in the case of the *Baltimore R. R. Co. v. Maryland*, a case which it was hoped time and the more recent decisions of the Court had overruled, the name which the Legislature chose to give to a tax did not make it valid, when under another name it would be void. In *Leloup v. Port of Mobile*,¹ the fact that the tax was called a license fee for establishing an office and doing business in the State did not prevent the Court from declaring it void when applied to telegraph companies engaged in interstate commerce. But it now seems that, while calling a tax a license fee does not aid the law, calling it a franchise tax covers all defects.

It is true the legislature might have refused the franchise, though they could not refuse a license to carry on interstate business ; but it has never been held that the power of refusal carried with it the power to impose illegal conditions, especially after the permission to exercise the franchise has been granted. This is principle involved in the decision in *Barron v. Burnside*,² which declared unconstitutional a State law requiring a foreign corporation, as a condition of doing business in the State, not to remove its causes to the Federal courts. The right to refuse to allow the foreign corporation to do business in the State did not

¹ 127 U. S., 640.

² 121 U. S., 186.

carry with it an implied power on the part of the States to violate the spirit of the Constitution. Yet in the case from Maine the Court says: "As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to value of the business permitted, as disclosed by its gains or receipts of the present or past years. *The character of the tax or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment.* The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

The case *Philadelphia, etc., S. S. Co. v. Pennsylvania*,¹ differs from the one under consideration only in the name the legislature applied to the tax. In both cases the State taxed the gross receipts irrespective of the source, whether they came from internal or interstate and foreign commerce. In other words, the tax was non-discriminating. In both cases one of the factors in determining the amount of the tax was the amount of business. It was this element which caused the Court to declare unanimously that the law of Pennsylvania unconstitutional. The professional and the business world applauded the decision.

It is true the Maine Legislature made the amount of the tax depend on another factor besides the earnings of the road, namely, the proportion of number of miles of line to the total mileage operated by the company. There is no question of the power of the State to tax the property

¹ 122 U. S., 320.

of a road as property, though used in interstate business, provided the property is within the State, but it has never before been maintained that a tax whose amount varied according to two factors was valid if, as a result, the tax fell on one subject under the control of the State, no matter how many other subjects beyond the control of the State were affected. The adoption of such a principle would render a tax by the State of New York on the amount of Chicago beef eaten by its citizens constitutional, provided the tax also depended on the total value of all butcher wagons in the State.

Perhaps, however, unconsciously, the principle by which the majority of the Court upheld the Maine law is, that the constitutionality of a State tax is to be tested by supposing all the States to pass similar laws, and then determining, in such an event, whether the same subject matter would be taxed twice. This principle was first recognized in *Pullman Palace Car Co. v. Pennsylvania*.¹ A tax on the capital stock of a company, based on the average number of cars which the company had within the State, was held to be constitutional, though the cars were engaged solely in interstate traffic. The Court sustained the law on the ground that if each State adopted this method of taxation the result would be that the property of the company was only taxed as property within each State, and that no property would be taxed twice over. Whatever may be said in favor of this principle, as one to determine whether property or persons are within a State for the purposes of taxation, or, as applied as in *Palace Car Co. v. Pennsylvania*, the distinction between the application of the principle in that case and its application to the one under discussion is obvious. A tax on property within the State, whether that property is engaged in interstate commerce or not, has been held to be constitutional; but previous to this last decision a State tax on the business of interstate commerce, whether carried on within or without the State, was always declared unconstitutional.

¹ 141 U. S., 18.

Yet, what else but a tax on interstate commerce is the result if each State can tax an interstate carrier of freight according to the receipts from such carriage within the State?

The freedom of commercial intercourse from the interference of local governments was the chief reason why we adopted a Constitution and became a nation. This freedom was supposed to extend, and we cannot but hope will yet be authoritatively determined to extend, not only to immunity from the legislation of a State hampering such commercial intercourse, but from this "interstate" or "combined State" legislation which has the same tendency. Legislation, whose effect on the commerce of the country, if attempted by one State would render it unconstitutional, surely cannot be made constitutional by all the State legislatures acting in concert.

THE RIGHT OF CONTRACTING WITH CITIZENS OF OTHER STATES.¹—Mr. McMurtrie, in his comment on the expression of opinion by the Supreme Court of Pennsylvania, besides calling attention to the fact that the clause in the Constitution preventing a State from impairing the obligation of contracts would be ineffectual to preserve our liberties, if it was not for the commerce clause, by implication raises an interesting question of constitutional law. As long ago as the case of *Bank of Augusta v. Earle*, the right of a State to prohibit a foreign corporation, chartered under the laws of another State, from doing business in the State, has been undoubted. The only exceptions are corporations authorized by Congress, as instruments to carry out one of the powers delegated to that body, and corporations engaged in interstate and foreign commerce, or commerce with the Indian tribes. That corporations are not citizens in the sense that they have the right to enter and do busi-

¹ For the case and criticism referred to, see Comments on Recent Decisions, *infra*.

ness in other States, either under the amendments to the Constitution or the Constitution itself, has been determined, as has also the power of the State to render void all contracts made by the agents of unauthorized foreign corporations within the State. But Mr. McMurtrie, now, for the first time, raises the question of the power of the State to prohibit the individual citizen from making, by his own agent, a contract with a corporation outside the State. This was what Biddle had done. By failing to send his agent to Boston, he had impliedly become a party to a contract of insurance on his mill. The Supreme Court intimated that, had they been compelled to construe the insurance laws of the State in such a way as to result in the fining of the defendant one hundred dollars for this action, such a law would be constitutional.

The act of a foreign corporation in the State, not relating to interstate commerce, cannot be said to be a part of that intercourse between the States which the Constitution preserves inviolate from the interference of State legislation. But it may be well argued that a contract between the agent of a citizen resident in State A and a corporation chartered under the law of State B, both agent and corporation being in State B at the time the contract is made, though the contract relates to land in State A, is intercourse between the States, not because the fulfilment of the contract necessarily implies such intercourse, but because the very making of the contract is itself intercourse. The fact that the agent employed is the United States mail does not alter the case.

BOOK REVIEWS.

THE LAW OF CONTRACTS IN RESTRAINT OF TRADE, WITH SPECIAL REFERENCE TO "TRUSTS." By GEORGE STUART PATTERSON, Ph.B., LL.B. Philadelphia: University of Pennsylvania Press, 1891.

The industrial development, not only of this country, but of others, has been of recent years so largely in the direction of combination or association of those engaged in

the same line of business, that the word "Trusts" has received a new meaning, and is used to apply generally to such combinations or associations, without regard to whether or not their terms are such as to make a technical trust. This tendency has largely been the result of the recognition, by business men, of the evils of excessive competition. Of course, the success of one combination has suggested the formation of others. But, in most instances, the individuals desiring to form the combination have had to be educated up to the idea ; some years of hard work, with little or no profit, leading to an appreciation of the saving in expense which they could effect by a close union among themselves, as well as the benefit to be derived from stability of prices. This tendency has presented new questions to both lawyers and legislators. The legislators have inclined to endeavor to strangle the tendency by stringent legislation, which legislation has increased the difficulty of the lawyer in formulating plans to accomplish the objects desired by his clients. Comparatively few cases of such combinations have been before the courts. How the law will finally regard them cannot be said to be settled. Of course they must be considered in view of the established principles of law in analogous cases. This little book by Mr. Patterson reviews the origin, reasons and limits of the rule of law which holds certain "contracts in restraint of trade" to be valid, and others to be void. The ordinary run of decisions on this question do not involve precisely the same issue which is presented for decision in the case of a "Trust." The reasons which induced the contracts which were before the courts, in these cases, are not exactly the same as those which induce the formation of "Trusts." But these cases are plainly the most analogous of the old decisions. Mr. Patterson's review of these cases is, up to date, scientific and the most satisfactory of any known to the writer, and will be helpful to any one who has to consider the problem of modern combinations. The last chapter of Mr. Patterson's book is entitled "Restrictions on Competition and Production." In this chapter he cites most of the decisions on its subject-matter. So far as it goes, the chapter

is satisfactory ; but one reading it, regrets that the limit of space imposed upon the writer prevented his going more fully into the decisions—for instance, such a case as that of *Mogul S. S. Co. v. McGregor* (L. R. 23, Q. B. Div., 528). This chapter is followed by the text of the Act of Congress of July 2, 1890. The reader may perhaps wish that he had been furnished also with the texts of the Acts of Missouri, Michigan, Illinois, Louisiana and Texas, on the same subject.

Mr. Patterson states that the only change made by the passage of the Act of Congress “in the law of contracts in restraint of trade is, that if such a contract is void at common law, and is in the province of the Federal jurisdiction, then it is a misdemeanor to be a party to it, and is punishable as prescribed by the act.” Without finding fault with this construction, it may be noticed that the act begins by declaring that: “*Every contract* combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.” What contracts in restraint of trade were illegal at common law, and what were not, are pointed out by Mr. Patterson in the earlier part of his work, and must be presumed to have been known to Congress at the time of the passage of the act. Quære, therefore, whether Congress has, by this act, made illegal every contract in restraint of trade, whether void or valid at common law.

B. H. LOWRY.

THE AMERICAN DIGEST. (Annual, 1891.) Being Volume 5 of the United States Digest. Third Series Annuals. Prepared and Edited by the Editorial Staff of the National Reporter System, St. Paul, Minn., 1891: West Publishing Co.

This volume unquestionably represents the highest stage of development of the mechanics of reporting. In its five thousand closely (but clearly) printed pages it presents a summary statement of all the decisions of the Supreme Court of the United States and of the other Federal courts, of the courts of last resort in all the States and Territories, of the

Court of Claims, of the Supreme Court of the District of Columbia, and of the Intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri and Colorado. When we learn that an addition to this volume contains notes of English and Canadian cases, memoranda of statutes, annotations in legal periodicals, a table of cases, and a list of decisions overruled, criticised, followed, distinguished and otherwise commented upon during the year, we are amazed at the completeness of the system which results in putting into the hands of the profession so much that is valuable within so short a time. But what solemn thoughts this volume suggests to the lawyer who looks at it for other purposes than the investigation of a particular point! From a rough calculation, based upon the table of cases digested, it appears that about 80,000 decisions are represented in this volume. If Lord Coke could exclaim in his day: "God forbid that counsel should know the whole law—or, for the matter of that, the judges either"—what language would his lordship give vent to if this volume of the American Digest could be exhibited to him and he could be informed that it represented the spawn of a single season? But the language of that learned and irascible judge, strong as he might make it on such a provocation, would surely become a thousandfold stronger if he were to examine the conclusions which have been reached in some of these 80,000 cases. If his learning had comprehended all the legitimate development of the law since his day, he would doubtless divide this mass of decisions into three classes: first, cases which involve points already well settled—useless cases; second, cases wrongly decided—worse than useless cases; third, cases which involve a real question and decided in accordance with principle and authority—useful cases. Would that the wheat could be thus separated from the chaff, and the chaff excluded from the American Digest!

Doubtless, if this were the function of the Digest-maker, the West Publishing Company would find some means of accomplishing it. The volume before us shows that they are not to be daunted merely because to the uninitiated the task seems a superhuman one. G. W. P.

COMMENTS ON RECENT DECISIONS.

THE POWER OF THE STATE OVER THE RIGHT OF CONTRACTING.

BY R. C. MCMURTRIE, ESQ.

(1) IN *Commonwealth v. Biddle* (139 Penn., 605), the question for decision was whether the making of a contract for insurance by the insured was, under the laws of Pennsylvania, punishable as a misdemeanor. The Court held that the statutes intended to punish the insurer and not the insured. It is not intended to criticise *the decision*, but there is a statement of the unanimous concurrence of the judges in a proposition that is of great importance, binding as it will probably be deemed on the lower courts. It is that "there is no doubt of the power of the legislature to make the insurance of his property in an unauthorized foreign company, by the owner, criminal, if done in this State."

This is premised by an analogous statement: "Beyond the limitations imposed by the Constitution, the power of the legislature to declare any acts done within the territory of the State unlawful or criminal cannot be questioned."

There is a prior reference to the Constitution of the United States as restraining the power of the State to interfere with the liability to enforcement of contracts that makes the reference to the restraining power of the Constitution (in the singular) significant. It would seem to imply that the Constitution of the United States has no further intention than to inhibit an interference with the obligation and the liability to perform the contract.

It is probable that this view is correct. It is reasonably clear, however, that the obligations of contracts are interfered with and impaired most materially if the person who makes them can be punished as a criminal.

On the other hand, it seems also quite clear that, if by the law of the place where the contract is made it is criminal, there can be no obligation.¹ It would be a singular combination of ideas if the result is that the Constitution of the United States has the effect of overruling the power of a State to prohibit a contract, leaving it as a binding contract, but not affecting the illegality and criminality of it. It will probably be found that the clause against impairing the obligation of contracts in the Constitution of the United States has no bearing on what is a contract; that all depends on the law of the place where it was made. It may be certainly affirmed that the clause was not intended to have any effect saving to prohibit legislation after a valid contract made.

¹It may be said that this particular contract is excluded from this general rule by the fact that the illegality arises solely from the revenue law, and no foreign State will pay any attention to such rules.

(2) The first point mentioned becomes of infinite importance looking to the tendency of what is known as the protective policy. If the community could once be made aware that they could make it criminal to buy or use anything produced within the States, though they cannot prevent the importation nor impose a duty, it will be singularly inconsistent with protection principles if we do not find that the commerce clause alone protects us from being made liable to fine and imprisonment for consuming Chicago beef and Minneapolis flour. They are already authoritatively informed that if they can make the assertion that these things are unwholesome, the Court must swallow—not the beef, but the assertion, for this is an exercise of the police power and is not traversable.

The probability is, however, that no legislation will stand that is aimed directly or indirectly at the freedom secured by the commerce clause of the Constitution of the United States.

(3) The great point, therefore, is how far does this commerce clause, and the clause securing the rights of citizens of a State to the citizens of another State, protect us from punishment for contracting without considering the nationality and residence of the other party? When the contracts relate to tangible property that is to be moved from one State to another, there would be no difficulty. That is commerce in its most evident form; and if a tax cannot be laid, we may depend upon it we cannot be imprisoned for the transaction. Nor is it likely to follow that the protection will be withdrawn when the act of importing terminates. A statute professedly aimed at interstate or foreign commerce, as one must be that imposes fine or imprisonment for possessing or using an imported article, certainly interferes much more with commerce than a tax on the business of an importer.

(4) But there is the vast field of contracts, out of which nothing in the form of tangible commerce comes. The instance in *Biddle's case* is an illustration—a contract to indemnify against fire.

In *Paul v. Virginia*, a phrase was used by Mr. Justice FIELD, probably true as applied to that case, namely, "*Insurance is not commerce*"—that is, an agency of a foreign corporation to deliver policies is not commerce in the sense that this business could not be taxed by a State. But if this means that a resident in a State cannot contract with a foreign corporation to insure him without coming under the penalty of fine and imprisonment, within what narrow limits are we secure in the right of intercourse with citizens of other States?

(5) There can be no doubt, as Judge MITCHELL has observed, of the power of the State to punish any one within its borders as it sees fit, saving as it is restrained; nor will any one dispute that the Constitution of the United States is as efficient as that of the States. There may be a dispute as to whether a prohibition to impair a contract includes a prohibition to punish for making it, or as to the effect of the commerce clause. But the probability is that the citizen will find that the authoritative exposition will be that no legislation can be enforced that aims directly at trammelling intercourse of any kind between citizens of one State and those of another, and with foreigners because they are such, and directly aims at spoiling for us the home market.

(6) It would be a funny spectacle, certainly, if the result of the *fracas* is that a citizen may make the contract by mailing his letter in Camden, while if he mails it on this side of the Delaware he is a criminal. This would be as absurd as if he could be compelled to perform the contract and sent to jail for making it by the same judge.

NOTE.

The case mentioned by Mr. McMurtrie was finally determined after reargument, on February 2, 1891. In 1873, the Legislature of Pennsylvania made it a misdemeanor, punishable by a fine of five hundred dollars for each offence, for "any person, or persons, or corporation receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or association not of the State," without a license under the insurance laws (P. L. [1873], 27.

In 1887, the legislature amended the section so as to impose two classes of penalties: one of five hundred dollars on every foreign association or corporation not of the State doing business within the State, for each month or fraction thereof during which the business was carried on; and another fine of one hundred dollars on "any person or persons, or any agent, officer, or member of any corporation paying, or receiving, or forwarding any premiums, applications for insurance, etc." (P. L. [1887], 62).

The defendant, Biddle, in 1887, after the foregoing amendment became law, received a notice from the Cotton and Woollen Manufacturers' Insurance Company of New England, not authorized to do business in Pennsylvania under the insurance laws of the State, that a policy on his mill in the company, which he had taken out in 1886, was about to expire, and that the same would be renewed, in pursuance of the by-laws of the company, unless the defendant signified his desire to the contrary. The defendant sent no reply, and thereafter received a renewal of his policy, for which he sent his check. For thus renewing his insurance he was convicted and fined one hundred dollars in the county court, the Court holding that the amendment of 1887 made it a crime for a citizen of Pennsylvania, resident in the State, to insure his property in the State in an insurance company not authorized to do business under the laws of Pennsylvania. The Supreme Court reversed this decision, and held that the amendment in question only applied to those who, as agents of unauthorized companies, sought to place insurances, and did not apply to one who, as in the case of Biddle, sought to obtain insurance on his own property.

At the same time, the Court, through Mr. Justice MITCHELL, intimated that the legislature of a State could make the "insurance of his property in an unauthorized foreign company, by the owner, criminal, if done in this State." But he adds: "Such a statute would be not only unusual, but a very harsh and extreme interference in the general right of a citizen to manage his private affairs in his own way, and we should not attribute such an intent to the act in question unless its terms be plain or the implication unavoidable" (p. 609).—*W. D. L.*

ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions.

BY

WILLIAM WHARTON SMITH,
HENRY N. SMALTZ,

HORACE L. CHEYNEY,
FRANCIS COPE HARTSHORNE,
JOHN A. MCCARTHY.

ALIEN IMMIGRANT—STOWAWAY—LIABILITY OF MASTER.—If a "stowaway," who, after discovery, has signed the ship's articles, and who has been regularly enrolled as a seaman, deserts from the ship upon her arrival at a port in this country, the master is not chargeable with a violation of the Act of Congress of the 3d of March, 1891, as such a person is not a destitute immigrant, but merely a deserting sailor: *United States v. Sandrey*, Circuit Court of the United States, Eastern District of Louisiana, December 26, 1891, Pardee, J. (48 Fed. Rep., 530).—*H. L. C.*

ABORTION—EVIDENCE—PERSON ON WHOM THE OPERATION IS PERFORMED IS NOT AN ACCOMPLICE.—Defendant, who was indicted for criminal malpractice, at the trial requested the judge to charge that the woman was an accomplice. Held: That the person on whom the operation was performed was not an accomplice: *Commonwealth v. Fallansbee*, Supreme Judicial Court of Massachusetts, January 6, 1892, Lathrop, J. (29 Northeast. Rep., 471).—*W. W. S.*

BILL OF EXCHANGE—ACCEPTANCE—REVOCATION.—The payee of a bill of exchange presented it through a bank, its authorized agent, to the drawee. Acceptance was indorsed on the bill by the drawee's treasurer and delivered to the bank. On the same day the drawee's treasurer learned of the insolvency of the drawer, and the next day applied to the cashier of the bank for leave to revoke the acceptance, which he refused to do, and notice was thereupon given to the bank to refuse payment. At time of acceptance drawer had no funds in hands of drawee. Upon an action on the bill by the payee against the drawee, held, that an acceptance delivered to the agent of the payee, duly authorized to receive it, is legally a delivery to the payee, and by such delivery the contract becomes *eo instanti* a completed one between the acceptor and the principal owner of the bill. Before delivery of the acceptance to the payee or his agent, the acceptor may erase his name, and he is not bound. But after delivery the acceptance cannot be revoked. Nor, in the absence of fraud on the part of the payee, is the drawee's insolvency or lack of funds in the drawee's hands an answer to his claim as a *bona-fide* holder of the bill: *Trent. Tile Co. v. Dearborn Nat. Bank of Chicago*, Supreme Court of New Jersey, January 2, 1892 (23 Atl. Rep., 423).—*H. N. S.*

BONDS—RECITAL ON BONDS ISSUED BY MUNICIPAL CORPORATION—ESTOPPEL.—In an action by an innocent purchaser for value, a municipality is estopped from denying allegations on the face of its bond that it has been issued according to law, and that the total amount of the issue

does not exceed the amount prescribed by law: *Chafie Co. v. Potter*, Mr. Justice Lamar (Mr. Justice Gray dissenting), January 4, 1892 (142 U. S., 355).—*W. D. L.*

COMMON CARRIERS—TORTS OF EMPLOYEES—LIABILITY FOR—FALSE IMPRISONMENT BY CONDUCTOR.—A conductor of defendant, while not on duty as a conductor, had plaintiff, lawfully on a car of the defendant, imprisoned, mistaking him for a man who, on a prior occasion, had made a disturbance on the car. Held: That the defendant was liable for the tort of its conductor: *Gillingham v. Ohio River Railroad Co.*, Supreme Court of Appeals of West Virginia, December 12, 1891, Holt, J. (14 South-western Rep., 243).—*W. W. S.*

CONFLICT OF LAWS—COMITY—DEATH BY WRONGFUL ACT—WHERE SUIT MAY BE BROUGHT.—Plaintiff was administrator of a person killed in Connecticut by the wrongful act of defendant. Held: That plaintiff could sue in Massachusetts, under a statute of Connecticut, to recover damages for decedent's death: *Higgins v. Central, etc., Railroad Co.*, Supreme Judicial Court of Massachusetts, January 7, 1892, Barker, J. (29 Northeast. Rep., 534).—*W. W. S.*

CONSTITUTIONAL LAW—CONSTRUCTION OF FIFTH AMENDMENT.—The constitutional guarantee that no person . . . shall be compelled in any criminal case to be a witness against himself is violated if one is compelled to testify in any criminal case, though he is not being prosecuted; and the fact that his testimony cannot be used against him in any Court of the United States, in any criminal proceeding, does not make the proceedings against him, to compel him to so testify, constitutional: *Councilman v. Hitchcock*, Mr. Justice Blatchford, January 11, 1892 (142 U. S., 547).—*W. D. L.*

CONSTITUTIONAL LAW—CORPORATIONS—THE TERM "EQUAL LAWS" EXPLAINED.—A State statute does not deprive railroad corporations of the equal protection of the laws which provide that the expense of a railroad commission created by the laws of the State be borne by the railroad corporations in proportion to their gross receipts and the number of miles operated within the State. It is a principle of law that a tax is not unequal which falls exclusively on those persons or corporations for whose benefit or regulation the money collected is expended: *Charlotte, etc., Railroad v. Gibbes*, Mr. Justice Field, January 4, 1892 (142 U. S., 386).—*W. D. L.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—VALIDITY OF STATE TAXATION FOR USE OF FRANCHISE.—A State may tax a railroad corporation engaged in interstate commerce for the exercise of its franchise within the State, which tax is based on the gross profits of the railroad, and the proportion which the number of miles operated in the State bears to the whole number of miles operated by the railroad corporation: *Maine v. Grand Trunk Railway Co.*, Mr. Justice Field, December 14, 1891 (142 U. S., 217).—*W. D. L.*

CONSTITUTIONAL LAW—WHEN FEDERAL COURTS WILL RESTRAIN STATE OFFICERS FROM CARRYING OUT UNCONSTITUTIONAL STATE LAWS.—In order that an injunction may issue from a Federal court to restrain an officer of the State from executing the laws thereof, it is not only necessary for the complainant to show that the State law is unconstitutional, but also to make out a case that can be brought under some recognized head of equity jurisdiction, such as that the act of the officer of the State would cause the complainant irreparable injury: *Pacific Express Company v. Seibert*, Justice Lamar, January 4, 1892 (142 U. S., 339).—*W. D. L.*

CONTRACTS, CONSTRUCTION OF—JOINT OR SEVERAL.—The plaintiff sued upon a written contract wherein it was agreed that if the nineteen defendants would subscribe \$300 among them and furnish the milk, he would build a factory and manufacture cheese for them at a small rate per pound. The contract was signed by the nineteen defendants, who set opposite their names the various amounts. It was held that the contract was several; that it consisted of as many distinct contracts as there were signers: *Frost v. Williams et al.*, Supreme Court of Dakota, January 21, 1891 (50 N. W. Rep., 96).—*J. A. McC.*

CONTRACT—CONSIDERATION.—Where the plaintiff, the owner of stolen property, agreed with the *bona-fide* purchaser of the property that if the latter would return part of the property stolen he could keep the remainder, the Court held the agreement to be void for want of consideration, upon the ground that the defendant, in agreeing to yield up part of the stolen property, was only doing that which he was bound to do: *Morgan v. Hodges et al.*, Supreme Court of Michigan, December 22, 1891 (50 N. W. Rep., 876).—*J. A. McC.*

CORPORATION—DUTY OF OFFICERS TO STOCKHOLDERS.—A director of a corporation having in his official capacity knowledge of facts enhancing the value of the corporate stock, of which the stockholders generally were ignorant, bought stock from a holder at a price below its real value. In an action for deceit, held, that a director is not, because of his office, in duty bound to disclose to an individual stockholder, before purchasing his stock, what he may know as to facts affecting the value of the stock. While he is to some extent a trustee for the stockholders as a body in respect to the property and business of the corporation, he does not sustain that relation to individual stockholders with respect to their several holdings of stock, over which he has no control: *Crowell v. Jackson*, Court of Errors and Appeals of New Jersey, November 17, 1891 (23 Atl. Rep., 426).—*H. N. S.*

CORPORATIONS—CAPITAL OF CORPORATIONS NOT A TRUST FUND—LIABILITY OF "BONUS" STOCKHOLDER.—Whenever a person becomes a stockholder in a corporation by reason of his being the recipient of a "bonus" issue of stock, subsequent creditors contracting upon the faith of the representations of the corporation as to the amount of its paid-in stock, cannot charge such person for the amount of the stock held by him, upon the theory that the assets of a corporation constitute a trust

fund for the payment of creditors. The property of a corporation only is a trust fund for the payment of creditors in the sense that all creditors are entitled to have their debts paid before there is any distribution of the assets among the stockholders. Nor can such a stockholder be held liable upon the theory that when it was issued he impliedly agreed to pay for it; for the agreement in the issue of bonus stock is specific that no consideration shall pass therefor. A bonus stockholder can only be charged upon the theory that he is a party to a fraud in enabling the corporation to misrepresent its financial standing. But in order to so charge him, the plaintiff must show that he paid a full consideration for the claim, if he is the assignee of the original creditor, for equity will never interfere in favor of one who purchases claims for a nominal consideration for purposes of speculation: *Hoopes v. the Northwestern Manufacturing Co.*, Supreme Court of Minnesota, January 18, 1892 (50 N. W. Rep., 117).—*J. A. McC.*

DEEDS, RESTRICTIONS IN—RIGHT OF VENDRES INTER SE.—A grantor conveyed certain contiguous lots by contemporaneous deeds, each of which restricted buildings to be erected on the lots to "first-class dwelling-houses only." Held: That the restriction was imposed on each lot for the benefit of all the others, and was enforceable by each owner against all the others: *Hano v. Bigelow*, Supreme Judicial Court of Massachusetts, January 8, 1892, Knowlton, J. (29 N. E. Rep., 628).—*W. S.*

EVIDENCE—HOMICIDE—RES GESTÆ.—Defendant was indicted for murder. At the trial evidence was admitted to the effect that immediately after the killing the accused started off, and a bystander said, "Call the police," whereupon the accused snapped his rifle at her. Held: That this evidence was a part of the *res gestæ* and properly admitted: Supreme Court of Georgia, December 28, 1891, per Curiam (14 S. E. Rep., 208).—*W. W. S.*

FREIGHT—LIABILITY OF BROKER.—An action for freight will not lie against a broker, whose only authority over the cargo is to sell it and pay the freight out of the proceeds: *Damora v. Craig*, District Court of the United States, Eastern District of Pennsylvania, November 10, 1891, Butler, J. (48 Fed. Rep., 737).—*H. L. C.*

GAS COMPANIES—SUBJACENT SUPPORT FOR PIPES—EMINENT DOMAIN—DAMAGES EVIDENCE.—A gas company entered upon plaintiff's farm, underneath which was a coal bed, and, in the exercise of its right of eminent domain, appropriated a strip of land running through the farm, and laid therein its pipes for the transportation of gas. In an action for damages, held, that testimony to prove the character of the soil through which the pipe line runs, the depth of the line below the surface of the ground, the proximity of the line to the surface of the underlying coal, the danger of the surface falling in when coal is removed, the probable breaking of the pipes, the danger of gas escaping into the mine, is both competent and relevant for the purpose of showing the general depreciation in the market value of the property, which is affected by the

right of subjacent support which is necessarily included in the servitude fastened upon the land: *Jefferson Gas Co. v. Davis*, Supreme Court of Pennsylvania, January 4, 1892, Sterret, J. (23 Atl. Rep., 218).—*H. N. S.*

HUSBAND AND WIFE—RIGHT OF WIFE TO SUE IN HER OWN NAME—ACTION BY WIFE FOR ENTICEMENT OF HUSBAND.—Statutes of Indiana give married women the right to sue alone for injuries to their persons or property. Held; That a married woman could maintain an action in her own name against one who wrongfully enticed her husband from her: *Haynes v. Nowlin*, Supreme Court of Indiana, December 8, 1891, Elliott, C. J. (29 N. E. Rep., 389).—*W. W. S.*

INDICTMENT—USE OF ENGLISH LANGUAGE.—A provision of the penal code of California declares that an information must contain a statement of the offence in ordinary language to enable a person of common understanding to know what is intended. Hence, where an information contained a photographic copy of a lottery ticket in the Chinese language, which was not translated into English, it was held not to be in ordinary language within the contemplation of the code: *People v. Ah Sinn*, Supreme Court of California, January 9, 1892 (28 Pac. Rep., 680).—*J. A. McC.*

INJURY TO EMPLOYEE—KNOWLEDGE OF DANGER—CONTRIBUTORY NEGLIGENCE.—Where the plaintiff's intestate was killed by the fall of a mine chamber, in operating the "caving-in" process of mining, the fact that the defendant, upon being apprised of the dangerous condition of affairs, had insisted that the men should return to the work, precludes the defendant from setting up the defence of contributory negligence of the employee in remaining at work, having knowledge of the dangerous condition of the mine. Employees on entering into a hazardous employment take the ordinary risks attending that service; but when servants complain of what appears to be an impending peril, and they notify the master of the danger, the latter cannot refuse to relieve them and insist upon their return to the place of danger, and then charge them with contributory negligence if they are injured in consequence of obeying such orders: *Schlacker v. Ashland Iron Mining Company*, Supreme Court of Michigan, December 22, 1891 (50 N. W. Rep., 839).—*J. A. McC.*

INSURANCE—CONDITION OF POLICY—OPEN LIGHTS.—The use of open lights in making repairs to the machinery of a mill is not a violation of the terms of a policy of insurance which forbids the use of open lights upon the premises insured, where it is shown that permission is given by the policy to make repairs, and that it is impossible to repair without the use of open lights. The granting of the permission to make repairs naturally presumes greater hazard in the doing of the thing permitted, and such permission must be deemed to have included all the incidents of that privilege or the right to do whatever was necessary in the course of such repairs: *Ausable Lumber Co. v. Detroit Mfg. Co.*, December 22, 1891 (50 N. W. Rep., 870).—*J. A. McC.*

INSURANCE—PAYMENT OF PREMIUMS WHEN DUE—WAIVER.—Where a policy of life insurance provides, "in case of default of the payment of any annual premium on the day it falls due, the policy shall become void and insurance shall cease," the payment of the premiums at the specified time is a condition precedent to the continuance of the risk, and it is not affected by a custom of the company to waive the prompt payment of the premiums and accept them within thirty days from the time they fall due: *Richardson v. Mutual Life Insurance Co. of Kentucky*, Court of Appeals of Kentucky, January 21, 1892, Pryor, J. (18 S. W. Rep., 165).—*H. L. C.*

INTOXICATING LIQUORS, SALE OF—WHAT CONSTITUTES SOCIAL CLUBS—LICENSES.—A law of South Carolina made it unlawful to sell liquors without a license. A *bona-fide* incorporated social club kept a stock of liquors on hand which its members could obtain on payment of not more than the cost price of the same. Held: That there was no sale here, and that the club need not have a license: *State v. McMaster*, Supreme Court of South Carolina, January 7, 1892, McGowan, J. (14 South-eastern Rep., 290).—*W. W. S.*

MANDAMUS—CORPORATIONS.—When a railroad corporation is authorized to run its line from one point to another by "the most eligible route as shall be determined by said company," a mandamus will not lie to compel the corporation to maintain a station at a particular town through which said company has elected to pass, though it appears that the company once maintained a station there, and changed the location of the station to a place where, at the time of the change, no house existed, but where it owned the title to the town site, the Court holding that the company is competent to decide what is the best situation for railroad stations: *Northern Pacific Railroad v. Dustin*, Mr. Justice Gray; dissenting Justices Field, Harlan, Brewer, January 4, 1892 (142 U. S., 492).—*W. D. L.*

MASTER AND SERVANT—RISK OF EMPLOYMENT—QUESTION FOR JURY.—Plaintiff was employed by defendant, and was obliged to use certain steps in leaving her work. The steps became icy, and plaintiff was injured on them. The steps were not icy, nor was there any reason to suppose that the business involved any risk in regard to them when plaintiff entered defendant's service. Held: That the danger incurred by the plaintiff in using the steps was not a risk of employment, and that the question of negligence was for the jury: *Fitzgerald v. Paper Co.*, Supreme Judicial Court of Massachusetts, December 19, 1891, Knowlton, J. (29 N. E. Rep., 464).—*W. W. S.*

NEGLECTENCE—CONTRIBUTORY—GETTING ON A MOVING STREET CAR.—Attempting to get on a street car while in motion is not contributory negligence *per se*, but is a question for the jury: *North Chicago Street Railway Co. v. Williams*, Supreme Court of Illinois, January 18, 1892, Magurder, C. J. (29 N. E. Rep., 672).—*W. W. S.*

PATENT—INFRINGEMENT—ATTACHMENT.—Motion for an attachment for violation of an injunction against infringement of a patent will

be denied where a new question has arisen which was not considered at the time of the granting of the injunction, and which requires a reexamination of the limits of the patent: *Enterprise Manufacturing Co. v. Sergeant*, Circuit Court of United States, District of Connecticut, December 23, 1891, Shipman, J. (48 Fed. Rep., 453).—*H. L. C.*

POLICE POWER—PUBLIC HEALTH—MONOPOLY.—An ordinance of the city of San Francisco granting to one A. the exclusive right of removing from the city limits all carcasses of dead animals, not slain for food, that shall not be removed or disposed of by the owner within twelve hours after the death of such animal, in such a manner as not to become a nuisance, and further requiring the owner of any dead animal not intending to remove the same within the specified time, in such a manner as not to become a nuisance, to deposit a notice thereof in a box to be provided for that purpose, is a valid exercise of the police power for the protection of the public health, and is not invalid as creating a monopoly, nor as depriving persons of their property without due process of law, nor as a contract in restraint of trade: *National Fertilizing Co. v. Lambert*, Circuit Court of United States, Northern District of California, December 7, 1891, Hawley, J. (48 Fed. Rep., 458).—*H. L. C.*

PROMISSORY NOTE, ALTERATION OF—LIABILITY OF SURETY.—Plaintiff sold a horse to A., and in payment took A.'s note indorsed by defendant. All parties understood that this note should be for \$175, but by a mistake it was made for \$170. After its execution plaintiff had the amount of the note changed to \$175. Held: That in a court of law and equity, defendant, as surety, was not relieved from his liability on the note by this change: *Busjalm v. McLean*, Appellate Court of Indiana, January 6, 1892, Crumpacker, J. (29 N. E. Rep., 494).—*W. W. S.*

PROMISSORY NOTE—RIGHT OF INDORSEE OF FOREIGN EXECUTOR TO SUE WITHOUT ADDITIONAL ADMINISTRATION.—Although a foreign executor cannot sue and recover a debt due to estate of decedent, yet a person to whom he has indorsed a note may recover without additional administration, if it does not appear that there are debts owing by decedent to residents of the State where suit is brought, and if it also does not appear that there is any statute of the State of domicile of decedent prohibiting such transfer: *Solinsky v. Fourth National Bank of Grand Rapids*, Supreme Court of Texas, November 13, 1891, Henry, J. (17 S. W. Rep., 105).—*H. L. C.*

PUBLIC WAREHOUSEMAN—SALE UPON COMMISSION—CONVERSION.—A public warehouseman, who receives and sells tobacco, receiving therefor a commission only and having no property interest in the goods, is not guilty of a conversion of them by a mere sale on account of the person who consigns them to his house for sale, if he has no notice of an adverse claim: *Abernathy v. Wheeler*, Court of Appeals of Kentucky, December 5, 1891, Bennett, J. (17 S. W. Rep., 858).—*H. L. C.*

RAILROADS—PUBLIC AND PRIVATE USE—EMINENT DOMAIN.—Where a railroad, chartered under the general laws of the State, is being

constructed for private use, the exercise of the power of eminent domain will be restrained: *Weidenfeld v. Sugar Run R. Co.*, Circuit Court of United States, Western District of Pennsylvania, January 7, 1892, Reed, J. (48 Fed. R., 615).—*H. L. C.*

SALE—INVALID TAX-SALE—COUNTY OFFICER—RIGHT OF TO SHOW THAT HE ACTED IN EXCESS OF HIS AUTHORITY.—A county treasurer accepted a ditch certificate in payment for land sold for taxes. Part of the taxes for which the land was sold had been paid, and the treasurer was then sued by the purchaser to recover a part of the purchase money under a statute of Indiana, which makes a treasurer liable to the holder of a certificate of sale when he sells lands for taxes which have been previously paid. Held: That the treasurer was not estopped from showing that he had no authority to receive the ditch certificate in payment for the land; that payment by the ditch certificate was not a cash payment, and that plaintiff could not recover: *Baldwin v. Shill*, Appellate Court of Indiana, January 6, 1892, New, J. (29 Northeastern Rep., 629).—*W. W. S.*

SALES—RECISSION—RIGHTS OF SELLERS.—Purchasers of lumber were unable to pay for it according to contract. The contract was cancelled, and the lumber was to be redelivered to the sellers. In pursuance of this agreement the purchasers executed a writing whereby they agreed to return the lumber to the sellers, holding it for them in their (the purchasers') yard subject to their order. The lumber was then marked with the sellers' name. In an action for trespass brought by the sellers against the sheriff for levying executions on judgments against the purchasers upon the lumber, held, that the lumber became the property of the sellers by marking it with their name and piling it separately, and it was unnecessary that it should be transferred to their place of business, as a change of location is not in all cases necessary to constitute a valid delivery of a chattel as against creditors: *Ayers et al., v. McCandlees, Sheriff*, Supreme Court of Pennsylvania, January 5, 1892, per Curiam (23 Atl. Rep., 344).—*H. N. S.*

SEAWORTHINESS—MASTER—MATE—Seaworthiness includes a competent master and crew, and it is therefore the duty of the owners of a ship to provide for such a contingency as the death of the master on a voyage to the Gold Coast, by selecting a mate competent to assume command if such an event occurs: *The Giles Loring*, District Court of United States, District of Maine, April 10, 1890, Webb, J. (48 Fed., 463).—*H. L. C.*

TELEGRAPH COMPANY—MISTAKE IN TRANSMISSION—CONTRIBUTORY NEGLIGENCE—UNREPEATED MESSAGES.—Plaintiff receives a message purporting to come from South Carolina instead of Staten Island, whence it was in reality sent. Although he expected a message from Staten Island, he went to South Carolina without making any inquiry of defendant's agents. Held: That he was not guilty of contributory negligence in so doing and could recover from defendant his traveling expenses. The fact that the message was unrepeated can have no bearing on the case, as the condition as to repeated messages applies to

the sender thereof, not to the recipient: *Tobin v. W. U. Tel. Co.*, Supreme Court of Pennsylvania, January 4, 1892, per Curiam (23 Atl. Rep., 324).—*H. N. S.*

WILLS—AMBIGUITY—EVIDENCE OF TESTATOR'S INTENTION—WHEN ADMISSIBLE.—Testator left a bequest "to the Sailors' Home in Boston," which was claimed by the National Sailors' Home and by the Boston Ladies' Bethel Society, both Massachusetts corporations working in Boston. Held: That evidence to the effect that testator was a prominent Baptist, interested in the work of a Baptist Church that was represented in the management of the Boston Ladies' Bethel Society, a Baptist institution which had maintained a "Sailors' Home in Boston," since several years prior to testator's death, and prior to the testator's will, began the creation of the "Sailors' Home Fund," which was known to the testator, was properly admitted to show testator's intention: *Faulkner v. National Sailors' Home*, Supreme Judicial Court of Massachusetts, January 19, 1892, Barker, J. (29 N. E. Rep., 645).—*W. W. S.*

WILL, CONSTRUCTION OF.—The testator left children and step-children. He gave to his children, whom he described as children "which came to me by marriage with my wife." He then gave the residue to his "wife and children." Held: his step-children had no right of participation in the fund: *In re Kurtz's Estate*, Supreme Court of Pennsylvania, January 4, 1891, per Curiam (23 Atl. Rep., 322).—*H. N. S.*

CONSTITUTIONAL LAW—IMMIGRATION LAWS CONSTRUED.—The Federal Government, as a national government, has complete control over the subject of the immigration of aliens to the United States. It is constitutional for Congress to provide that the decision of the Inspector of Customs as to the right of an alien immigrant to land in the United States shall be final. Congress has provided that the decision of the Treasury Department shall be final, and therefore, on a writ of habeas corpus to the circuit courts on behalf of an immigrant about to be returned to the country whence she came, the only fact to be determined by the Court is whether the Treasury Department has determined whether the immigrant had a right to land: *Nishimura Elin v. United States*, Mr. Justice Gray, January 18, 1892 (142 U. S., 651); Mr. Justice Brewer, dis't.—*W. D. L.*

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SHYLOCK *v.* ANTONIO—JUDGMENT AFFIRMED.

BY GEORGE WHARTON PEPPER, Esq.

In a recent number of the *American Law Review*¹ Professor James M. Love has published "A Lawyer's Commentary upon Shylock *v.* Antonio." It seems that the commentary was originally delivered by the author to his students, in Iowa University, at the conclusion of a course of lectures on the law of contracts. The report of the litigation is given, for the most part, in the very words of the Great Reporter, and then the author feels compelled to declare that the trial, from a legal point of view, is "from end to end a tissue of absurdities." "The idea," says Professor Love, "of the 'grave and reverend seigniors' of Venice, rulers who are world-renowned for their unequalled astuteness and knowledge of affairs, listening with complacency to the exposition of the laws of their own city by a doctor of laws who must have appeared to them to be a beardless boy of sixteen or seventeen summers, is such a violation of probability as to give the whole scene a melodramatic air." And again: "Were the duke and all of

¹ 25 *Am. Law Review*, 899.

his wise judges and counsellors ignorant of the laws of Venice? Had no one of them the faintest conception of the principles of universal justice? If they had any knowledge whatever of jurisprudence, what must they have thought of the law as laid down by the saucy little doctor, to the effect that Antonio had no right to discharge the bond by tendering the amount due in open court, but that his life must needs be forfeited because he had failed to pay off the obligation on the very day of its maturity."

Now the first of these extracts, it will be noticed, involves the assumption that Portia's statement of the law was, as Professor Love subsequently styles it, "a piece of sublime pettifogging." If it shall appear that her opinion was, on the contrary, a lucid exposition of sound legal principles in their application to the case in hand, it will follow that honor, and not ridicule, should be the meed of that learned Court which refused to give place in its criminal law to "the heinous crime of being a young man."

As to the second extract, I content myself with remarking that it was a well-known principle of the common law of England, until the *strictum jus* was modified by equitable principles,¹ that a tender after the maturity of the bond was too late, even if made in court, and that the obligee had a right to insist upon the penalty.² If I am then referred to Professor Love's statement that "it was simply monstrous to maintain that a contract, the very purpose of which was murder, could have the least shadow of validity," I retort by quoting from the distinguished German jurist, Pietscher.³ "I believe that I dare assert," says he, in commenting upon a similar criticism made by Dr. Ihering, "that at that time in Venice the consideration that 'a contract against morals was void' was not yet recognized or regarded as a valid plea. For this consideration,

¹ "It may be observed here that the law language of Shakespeare is that of the common law, and not of equity jurisprudence."—C. K. Davis, *Law in Shakespeare*, p. 117.

² Indeed, courts of common law had no power to refuse to enforce penalties until such power was given by statute. See Bispham on Equity (4th ed.), § 178.

³ Landgerichts-Präsident; *Jurist und Dichter*, Dessau 1881, p. 19.

or more properly its recognition in law, belongs only to the higher grades of culture, and always even then depends on the prevailing estimate of what is immoral, and its *full* significance will have to remain, I suppose, a pious wish."

With these preliminary remarks, I proceed to examine Portia's conception of the case and the "opinion of the Court" as delivered by her. For, after all, it is to the opinion that a lawyer must look if he wishes really to fathom the case. And, in order to understand the opinion he must first ascertain what the Court actually decided and then interpret the language of the judge in the light of the decision. It is manifestly unfair to criticise the Venetian Court, as the scoffers do, for being puzzled in advance of an orderly examination of the question. Doubtless we could find a similar state of affairs in the consultation-room of many a modern court, even after the judges have heard a careful and elaborate argument upon the point of law involved. Similarly it may be said to be unfair to criticise Portia's opinion in *fragments*. It must be taken as a whole, and its parts must be interpreted with reference to one another. Such a method is required by common justice; a criticism which ignores this method and then accuses Portia of "quibbling," brings itself within the operation of the good old maxim, "Those who live in glass houses should not throw stones."

And it is here that I take issue with Professor Love. I admit that his view is sustained by respectable authority. Haynes, Davis, Campbell, Judge Cowen, Ihering—all declare that Antonio was saved by a quibble.¹ It is, indeed, astonishing to see the amount of learning and research which has been expended upon the law involved in the trial scene. On delving for the first time into the work of some of the German scholars, I feel like one who has by chance turned up a mossy stone and is amazed to see the industry displayed by a colony of ants who live and work beneath it. But all these learned critics discard what I have indicated as the only rational method of treating the

¹ See notes to trial scene and appendix to "The Merchant of Venice," in Furness's *Variorum Shakespeare*.

question. They all regard Portia's statements, not as part of a connected and logically developed judicial utterance, but as separate and distinct propositions which they proceed to construe as if each stood alone and had no reference to the others. They are misled by the dramatic form in which the opinion is reported. Merely because it was impossible, from the play-wright's point of view, that the trial scene should be a monologue by Portia, these critics compel her to suffer the consequences of that which was done for their own delectation and for that of the rest of the audience.

We may now examine Professor Love's objections to the opinion which Portia delivered in the capacity of *amicus curiæ*. His view may be thus expressed: The learned [formal, merely] Portia erred (1) because, assuming the bond to be otherwise valid, she did not declare it void as having been obtained by fraud; (2) because she declared that the bond was valid; (3) because she, in the next breath, declared that in procuring it Shylock had committed a heinous crime; (4) because she declared that the bond, although valid, conferred no right to shed as much blood as was reasonably necessary in removing the flesh.

But what, in fact, did the Court decide? *The decision was, that the bond was a contract to do something forbidden by statute, that it was consequently void, and that there could be no recovery upon it. Also that such a contract came within the terms of another statute, which made it penal for an alien, by direct or indirect attempts, to seek the life of any citizen.* There is surely no error in this; a modern court, under the same circumstances, would make a similar decree and order the bond to be cancelled.

But what of Professor Love's specifications of error? I proceed forthwith to examine them.

As to the first, it seems that Professor Love bases his claim of fraud upon Shylock's representation that the bond was to be sealed "in merrie sport," and upon the fact that the Jew treated the whole matter as a joke, by asking—

Praise you tell me this,
If he should breake his daie, what should I gaine
By the exaction of the forfeiture?

Now, Antonio had but a few minutes before made an explicit statement that in dealing with Shylock he preferred to "deal at arm's length," so that the evidence to establish fraud must needs be particularly weighty. But when we scrutinize the transaction, it does not appear that the Jew made any false representations whatever. He did, indeed, ask an evasive question, from which it might be inferred that he would not exact the penalty. But this is not the fraud which will vitiate a bond; it is even a grave question as to whether, at the common law, parol evidence of these extrinsic matters would have been received at all. And, moreover, Antonio apparently did not rely upon the representation, such as it was, but assigned his own ability to satisfy the obligation as the inducement to his action.

Come on, in this there can be no dismaie,
My shippes come home a month before the daie.

Again, it must be remembered that Portia decided the bond void by statute, and this made it unnecessary to consider any other grounds of invalidity. Indeed, when an instrument is void by statute, it is the duty of the Court to rest its decision upon that fact; any additional or alternative reason for arriving at the same conclusion is to be considered as merely *dictum*. But, admitting that deception had been practised, and that there was sufficient ground for the admission of parol evidence, it will be noted that no evidence to this effect was brought before the court. When Portia asked the defendant, "Do you confess the bond?" he might, if he had seen fit, have filed a special plea alleging the fraud.¹ But he did not adopt that course. He replied, "I do," and thus admitted the execution of the bond, and gave it a *prima facie* validity.

These considerations make it clear that Portia's professional reputation has nothing to fear from the first specification of error.

The result of the above admission was, to Portia's logical mind, that Shylock had now a standing in court,

¹ Campbell suggests *non est factum*. But it should seem that the defendant ought, in such a case, to plead specially.—Collins v. Blantern, 2 Wils., 347.

for the Jew had in effect filed a good declaration, while the defendant had not yet craved *oyer* of the condition and penalty. It would, therefore, have been premature to pronounce upon the legal effect of that which was not, so to speak, a part of the record. Accordingly, Portia declared that the trial must proceed unless the plaintiff would forbear, and she exerted all her eloquence to effect a settlement and to induce the Jew to enter a *nolle prosequi*. But he refused to be turned from his purpose, and defiantly "craved the law." Portia then proceeded to show how unreasonable this obstinacy was by eliciting from Bassanio a tender of the principal and more; but she vindicated her right to the title of judge by recognizing that "hard cases make bad law," and she refused to compel an acceptance of a tender which had come too late.¹

Portia's next step was to accomplish the result of a demand of *oyer* by asking to be shown the bond. She was thus in a position to address herself to the great question in the case—the validity of the condition and the penalty—a question which had now been put squarely in issue by disposing of every other matter which might have influenced the decision. And it will be observed that this was the first time that the terms of the penalty had come *judicially* to her notice. As an individual, she, in common with every one in Venice, was cognizant of the Jew's demand; but as *judge* she now looked upon the condition and penalty for the first time. Or, if it be objected that the penalty had been matter of record from the first, and that *oyer* was demanded only of the *condition*, it does not follow, as has been pointed out, that Portia would have been justified by the state of the law in at once declaring such a penalty vicious. For, in addition to other considerations, it must be remembered that the law of the Twelve Tables gave to creditors the right to cut the body of their debtor in proportionate pieces if he could not satisfy their claims,² and

¹ The soundness of this position has already been demonstrated. See *supra*, p. 226, Note 2.

² I know that this interpretation of the Twelve Tables is disputed by Dr. Muirhead. But up to his time the consensus of opinion has been to the effect stated in the text.

this was a dangerous precedent. Professor Love, indeed, attempts to distinguish the two cases, by pointing out that at Rome the barbarous act was in the nature of a punishment inflicted, while in Shylock's case the mutilation was the object of the whole transaction. But this distinction is a fine one. It assumes that the limits of lawful consent had been already determined in Portia's time, which is by no means clear. It assumes, moreover, that the Court could at once declare the bond to be nothing but an attempt on the defendant's life. But the defendant had not raised the point ; he had admitted the bond, and the Court was compelled to believe that he had gone into the transaction with his eyes open. The only distinction between the two cases would thus be, that in one the penalty was agreed upon by the parties, while in the other it was prescribed by the law. But, at any rate, the question is unimportant as regards the soundness of Portia's position, for it is clear, on principles already adverted to, that her most prudent course was to bring the whole case within the operation of the statute law of Venice. She had, of course, formed her theory of the case, and, in the development of it, had now reached the point at which she must show the applicability of the particular statute on which she ultimately based her decision. But what were the provisions of that statute? All that we know of it is from Portia's own statement, and she, presumably, used the very terms of the act when she said :

. If thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.

The offender's life was, we learn subsequently, also forfeited.

It was, in other words, such an enactment as we might expect in view of the state of public opinion toward the Jews. As it was a criminal statute, Portia was compelled to give it a strict construction. Moreover, she was passing upon the suit of an alien whose right to sue was, presumably, dependent on comity only, and, besides, popular

opinion was against the plaintiff. She, therefore, had the honor of the Court to sustain, and, impartial judge that she was, she felt it her duty to proceed with double caution. She accordingly summed up the results of her investigation in the declaration that the bond appeared upon its face to be forfeited, and that, therefore, the Jew might *lawfully* claim the penalty—for it will be noted that the examination of the bond had shown that the penalty was a demand for *flesh*, while the statute spoke only of *blood*. Such a discrepancy may be thought a trifling matter to-day, but the variance would doubtless have been fatal in any one of the *legis actiones* under the Roman formulary system.¹ So she proceeded: (1) to obtain from the plaintiff's own lips an admission that the enforcement of this penalty necessarily involved the shedding of Christian blood; and (2) to demonstrate that fact independently of his admission by a dramatic *reductio ad absurdum*.

She accomplished the former result by an exhortation to mercy (which the Jew, of course, withstood) and by beginning forthwith to pronounce judgment as if in favor of the plaintiff. This made the Jew so bold that he even felt safe in refusing to have some surgeon ready

“To stop his wounds, lest he should bleed to death.”

Having obtained from Shylock this recognition of the fact that the step he proposed to take must result in shedding Christian blood, she at once bridged the last gap which separated her from her conclusion. *She demonstrated that the right to take the penalty of the bond necessarily involved the doing of something forbidden by statute, and hence that the bond conferred no right at all.* This disposes of the second and third assignments of error, for it becomes clear that Portia's declaration that the bond is valid merely related to the effect of that instrument independently of statute. Yet Professor Love and the other

¹Gaius, c. iv, §§ 16, 21, 30. Thus, where one whose vines had been injured sought redress under the provisions of the Twelve Tables, he lost his case because he used the word “vines,” when the statute spoke generally of trees.—Gaius, c. iv, § 11.

critics so completely misunderstand Portia's argument that they actually accuse her of deciding that the penalty could not be recovered merely because the bond conveyed no right to shed blood!

So far is Portia from being guilty of the quibble of which she is accused that she says to Shylock: "This Court cannot authorize you to shed Christian blood; our statute law forbids; but the Court will award you your pound of flesh if you will run the risk of violating the statute in taking it." It is immaterial whether this is regarded as an argumentative statement that the bond is necessarily invalid as being a contract to do something forbidden by statute, or as a statement that the bond is in itself valid, provided the penalty can be recovered without violating the statute. I prefer the former view, and attribute the form of the decision to the dramatic necessities of the case. But the latter view is unobjectionable if Pietscher is right in his opinion, that there was no general principle of law which rendered the bond void. And this disposes of the fourth assignment of error.

More acute than the critics of his judge, Shylock at once sees the relentless logic of the situation and offers to accept the tender of triple payment which lately he refused with scorn. But here again he is met by an obstacle which he cannot overcome. He has refused to show mercy, he has spurned a compromise. He has declared, "I stay here on my bond." Of course, the Court can do only one of two things—it can award him his penalty or award him nothing. This Portia announces with distinctness—first, in the unvarnished statement, "He shall have nothing but the penalty," and then in those powerful lines:

Therefore prepare thee to cut off the flesh,
Shed thou no blood, nor cut thou lesse nor more
But just a pound of flesh; if thou tak'st more
Or less than just a pound, be it so much
As makes it light or heavy in the substance,
Or the division of the twentieth part
Of one poor scruple, nay, if the scale doe turne
But in the estimation of a hayre,
Thou diest, and all thy goods are confiscate.

In other words, she urges him to avail himself of the only award which the Court can make in his favor, and she terrifies him with a vivid picture of the awful scrutiny to which the Court will subject him in the performance of his impossible task. It is a splendid peroration—a royal *dictum*—a grateful relief after the close logic of her argument.

Shylock pauses. He does not see that Portia's decision means that the Court will permit no attempt to enforce the penalty. He thinks that the Court's decree entitles him to take Antonio's life at the cost of his own, and he deliberates as to whether or not he will pay so high a price. Dr. Furness intimates that the balance is trembling between comedy and tragedy:¹ Shylock's decision not to claim the penalty settles the question in favor of comedy. But suppose that he had decided to claim his fancied right. Even if he had been permitted to attempt the impossible task, his actions could have been so controlled that long before matters had assumed a tragic aspect he would have shed that drop of Christian blood, which, by making him a criminal, would have prevented him from further availing himself of the decree. But, from Portia's argument, as outlined above, it is clear that such a decision on his part would have been met by the indignant explanation that he trifled with the Court who so interpreted its decree. She would have explained that a permission to do the impossible is no permission at all. And this may be asserted with all the more confidence in view of Portia's final refusal to award the Jew the money which Bassanio offered and which Shylock was willing to accept. If Portia had understood that Antonio's life might hang on this portion of her decision, it is too high a tribute even for me to pay to her judicial firmness to suppose that she would not have relaxed the rigid rules of law then and there, and settled the case to the satisfaction of every one.

But it is almost as inhuman to discuss the "what-might-have-been" in a play as to cut a pound of human flesh by way of penalty for non-payment of a debt. And

¹ The Variorum Shakespeare: "The Merchant of Venice," p. 223, note.

so we may take leave of the case with the remark, that there is not wanting in judicial records a precedent for Portia's final act—the passing upon Shylock of a penal sentence for attempting the life of a citizen.¹

On the whole, therefore, we perceive no error in the record, and it follows that Professor Love's assignment of error should be dismissed. The decree of the Venetian Court should be affirmed, and thus tardy justice will be done to the learned Portia. She has been called a "pettifogger;" but even if there are some who will dissent from my view of her opinion, yet all, I think, will admit that she deserves no such appellation. How lacking in gallantry have her stern legal critics been, even assuming their criticisms to be well founded! And it is surely a surprising thing that Professor Love should be found among their number. For was it not Portia who, with matchless eloquence, exhorted the Jew to be merciful? And who should be so ready to show mercy as Love?

AN EXAMINATION OF THE DECISION IN *TILDEN v. GREEN*.

BY R. C. MCMURTRIE, ESQ.

Criticism of a decision of a foreign court is of all things the most dangerous. No one that has watched such attempts upon subjects he is familiar with, can have failed to see that local notions and statutes cannot be readily comprehended by strangers. Two illustrations will suffice. Mr. Bell, Professor of Law in the University of Edinburgh, deduces this result from a study of Kent's Commentaries: "The law of the United States (respecting sales of personal property) . . . is grounded on the law of England, and has indeed been settled nearly on the footing of the

¹ See an instance of a sentence of this kind in connection with a civil suit in a court administering Spanish law, in an article by John T. Doyle, in *The Overland Monthly* for July, 1889. Venetian law was presumably the same.

Statute of Frauds as applicable to all contracts for the sale of goods and chattels for the price of \$50 or more. . . . The Statute of Frauds, as *thus adopted in America*, has years ago been *reconstructed by the Legislature of New York*. . . . The law of *America*, standing on the same footing as that of *England* under the Statute of Frauds, the precise words of which had been adopted *in the American Statute, etc.*"¹ The other illustration is the disclaimer by Lord Campbell of the power assumed by the courts of the United States to declare a statute void as illegal.

Such examples may well deter one from attempting a criticism of such a decision as that of *Tilden v. Green*.² But there are some grounds upon which this decision seems to rest, that may without arrogance—even with profit—be discussed by a foreigner, for they profess to be principles of the common law.

The case decides that a charity which requires a discretion of trustees to organize it, a charity where the form and mode of operation are not sufficiently defined to enable a court to compel its execution in that mode, is void. So far as this results from local statutes, or a common law of the State differing from the law of England, it would probably be unwise, at least for a foreigner, to criticise the conclusion. But if these or either of them are the grounds, it is unfortunate that other reasons were resorted to. Distrust and uncertainty are the invariable result of a double postulate, one branch of which is either untrue or misunderstood. Moreover it is, to some extent at least, to be inferred that the alleged local statutes are deemed to be legislation in the line of what is assumed to have been the common law, until marred by the arrogant assumption of ecclesiastic chancellors. This is quite evident from the dissertation by WRIGHT, J., in 33 New York, 97, 106, one of the foundations for the judgment in the *Tilden* case. Moreover, that judgment does, it is submitted, utterly misstate as well as misunderstand the object and effect of the Statute of 9

¹ Bell's Contract of Sale, pp. 59 and 62.

² 31 American Law Register and Review, 75.

Geo. II, and it is supported, as on a sure and sound foundation, by the assertion that the jurisdiction by which these estates were protected and preserved rests on the 43d Eliz.—which is a matter of *fact*, not of opinion, and is demonstrably untrue.

These are apparently the postulates on which this decision is based by Mr. Justice BROWN and the majority of the Court : First, the statement of Judge WRIGHT, in *Levy v. Levy*:¹ “ *If there is a single postulate of the common law established by an unbroken line of decisions it is that a trust without a certain beneficiary who can claim its enforcement is void.*” Second: “ *The equitable rule that prevailed in the English Court of Chancery, known as the Cy-pres doctrine, and which is applied to uphold gifts for charitable purposes, when no beneficiary is named, has no place in the jurisprudence of this State.*”

There is a third postulate, for which *Read v. Williams*² is cited as the authority. An indefinite purpose to be executed by a power given to a devisee, as a trustee, is contrary to the Statute of Wills, because it substitutes the will of the donee for that of the testator. Precisely what is meant by the abstraction quoted from *Read v. Williams* is uncertain. It may be that a devise to A. for life, and remainder to his appointees, is illegal under the New York statutes. It is if the statement of the reason for the decision is true. If it means what was admitted in *Morice v. Bishop of Durham*, it is a singularly caricatured statement of that rule. In either case the reason assigned for the rule cannot be the true one as applied to statutes of wills as such.

It would naturally be inferred from the above-quoted passage that there was some occult and mysterious quality in the Statute of Wills that produces this effect ; whereas the cause is the same which operates to make it impossible to get rid of water in a bucket, unless it is placed somewhere else. Did it ever occur to ask what is the rule in the case of a grant ? In this respect how do deeds and wills differ ? If they do not, certainly it is not the policy of the Statute

¹ 33 N. Y., 107.

² 125 N. Y., 560.

of Wills that produces the rule that property must have an owner.

Compare this portentous declaration with the simplicity of Sir WILLIAM GRANT.¹ A trust without a beneficiary is void, because *an uncontrollable power of disposition is ownership*. Ownership in the trustee being excluded by the fact that he is a trustee, there can be none unless the Court can ascertain who is the owner. But charities are an exception, because the Court or the Crown will direct the peculiar application. A trust is a means, not an end. Ownership is the end or object. If there is none mentioned there would be a deed without a grantee, or a will without a devisee ; that is, an incompleated attempt to grant. The principle is the one common to all conceivable modes of transferring property, whether by contract, deed, will or law.

One cannot help being curious to learn if these were the points which counsel were expected to meet to sustain the trust. For it is quite certain that it was these very objections to a trust for charitable uses, that forty-eight years ago were supposed to exist and were relied on in the case of Girard's Will. They were then met and (it was supposed) demolished by the great argument of Mr. BINNEY in that case as they had been before by Mr. Justice BALDWIN, in *Magill v. Brown*. It may therefore be permitted, without incurring the charge of arrogance, to point out where the fallacies lie in each one of these postulates, for the purpose of relegating the Tilden will case to the category of an unfortunate provincial peculiarity of no importance to anyone but the people that are living under such a system of law.

There is a bit of the argument that deserves notice, first, because it seems to present such a specimen of reasoning as to cast doubt on the validity of the residue. *Inglis v. The Trustees of the Sailors' Snug Harbor*² is got over by this statement, which appears to be meant for reasoning. There was there a direction to apply for legislation creating a corporation, if such application was necessary to render

¹ 9 Ves., 405.

² 3 Peters, 99.

the devise valid. Here the creation of the corporation was in the discretion of the executors. Surely, if the discretionary element in the gift of the power to create a body capable of taking, holding and administering was fatal because legality or illegality must depend on things as they are at the death of the testator, there was the same mere discretion in the case of *Inglis v. The Trustees* as in Mr. Tilden's will—granting the trustees could be compelled to apply, could the legislature be compelled to grant? Moreover, it is a singular notion of discretion, surely, that holds that a trustee's discretion cannot be controlled. What this word means it would be quite impossible to discuss at length here; but certainly it has never been heard of that a trustee could destroy a person's rights by declining to exercise this discretion. Blunders enough there are as to the meaning of the word, but no one before appears to have so misunderstood its meaning. It means, if we may be guided by authority, that *he must do what is most beneficial to the owner*.¹ No one has stated the rule better than the great American Chancellor, DESSAUSURE, so that we need not fear being snubbed for resorting to English precedents, invented by ecclesiastics and not applicable to a free people.

The supposed distinction between that which is private property and a gift to a class, or an object, or a purpose by any description that constitutes a charity, will be noticed further on. All that need be said here is, that by the common law, if we include equity within that definition, there has never been a time when a class such as *the blind*, or *the poor*, or *the sick* was not as absolutely capable of taking by a gift or grant as individual persons are. Such a mode of dealing—with not a case but a great principle of law such as was elaborated in the *Sailors' Snug Harbor* case—can scarcely commend itself to the judgment of men. If it is conceived that there is a distinction between a discretion which is necessary to make a right in a private person capable of enjoyment, and a discretion to select

¹Harper's Equity, 114; *Haynes v. Cox*, per Dessausure, Ch.; *Mislington v. Mulgrave*, 3 Madd., 491; *In re Coleman*, 39 Ch. Div., 446.

objects of a charitable gift, it is submitted that this is a mistake for which there is no foundation, but a dictum of Lord LOUGHBORO followed, it is true, in some of the American courts, but which is demonstrably incorrect. That the Court will compel and oversee the exercise of a discretionary power in respect of charities was decided in *Attorney-General v. Glegg*, Ambler, 584; and that an optional right to select could be postponed, and, therefore, the right be destroyed at the pleasure of the trustees, was evidently treated as absurd in *Moggridge v. Thackwell*.¹ As to the first point, there is no fault to be found with the abstract statement that the law requires certainty in a devise; but it would be well to ascertain the meaning of this rule. The law of the land vests property, when the owner ceases to live, in some one, and his title is held precisely as was that of the deceased owner—i.e., by the law of the land. Without discussing the political question how far a dead man may control things after he ceases to exist, all will agree that it is by the law of the land that he can or cannot do this. And it necessarily follows that he must name someone to be owner or describe him, so that he can be ascertained, or the person named by the law must take. There then arise two possible classes of cases, and this seems to have created the confusion. A gift naming an owner or one to take for himself or for someone else creates *property*—that is a right in the person named to apply to his own purposes. Now, there must be somebody who can claim this right, who stands to the State as the owner and can fulfil the duties of ownership; and the second class must be subject to the same rule—and, therefore, a gift to a class, if indefinite, is void. Of course, all contingent interests are included in this.

But the first thing to be noticed is how entirely untrue is the statement of Judge WRIGHT as an abstraction. Assuming the New York Statute of Wills is not different in this respect from all other statutes in the civilized world, no one will say that a devise to A. for life with a power to appoint by deed or will is void, and yet it is quite certain that

¹ 7 Ves., p. 82.

there is and can be no beneficiary except A. until he exercises the power, assuming the New York Statute of Wills is not different from all other statutes of wills in the civilized world. It is in this way only that the futility of such extremely universal statements can be tested.

It may be granted that a mere power of appointment without an immediate estate of any kind is void. There are plain reasons for this ; but they are independent of any statute of wills. But it is also quite certain that if the devisees can be ascertained it is valid. What, therefore, apparently was in the mind of Judge WRIGHT when he made this somewhat exaggerated generalization was the rule that governs trusts. He evidently is speaking of the English law ; his citation of *Gallego v. The Attorney-General*,¹ a Virginia case, shows he was not dealing with the question as one of provincial jurisprudence.

Now, the distinction that governs trusts is probably most clearly brought out in a case that had the benefit of a discussion by two great makers of the law—Lord ELDON and Sir WILLIAM GRANT.² The trust was for “*such objects of benevolence and liberality as the trustee in his own discretion shall most approve.*” It was conceded by all that if the objects were not charitable the devise was void, for the trust excluded a beneficial interest not declared, and a trust without an object is void.³ The express trust precluded a possible beneficial interest in the trustee, and no court could ascertain what purpose was intended. The next of kin represented by Sir Samuel Romilly and Mr. Bell (probably the great pleader) admitted that if it was a charity, the *indefiniteness was immaterial*. It was decided not to be a charity and hence void. It will be said (Judge BROWN impliedly does say) that by that time the rule in

¹ 3 Leigh., 457.

² *Morice v. the Bishop of Durham* (10 Vez., 532 ; 9 *Id.*, 399).

³ Why it did not appear necessary to counsel or Court to give a reason. If it were not it would result that property might be held for the life of a trustee, belonging to no one and incapable of being used for any purpose whatever. But the rule as the reason applies to all possible forms of conveyancing. A resulting trust arises for the grantor or the heir.

the English Chancery was settled and hence the concession. What is to be noticed is that if the devise is to a charity, indefiniteness of the object is quite immaterial, and what is the reason for this rule? Is it because of anything peculiar to English law that did not form part of the law that came with our ancestors, and was part of our law before the Revolution? Has it anything to do with the Statute 43 Eliz., or with prerogative, or with Cy-pres doctrine, as we generally understand those words? It is true this was supposed, once upon a time, to be the case in Virginia, Maryland and by the Supreme Court of the United States. Traces of this notion can be found everywhere. Even in Pennsylvania, where the statute is not in force, there was supposed to be a doctrine of some kind that was called "*The Equity of the Statute*," that could maintain a trust for persons incompetent to take, without any devises capable of taking.¹ But it has been generally supposed for forty-eight years past that all this was shown to be utterly without any foothold other than a mistaken dictum of one Chancellor, and the thing had been given up and abandoned.

In 1833, and before the publication of the "Record Commission," the subject had been examined with a care probably never before or since bestowed on such a question. The judgment of Mr. Justice BALDWIN, in *Magill v. Brown*, reprinted from a pamphlet in Brightly's Reports, covers 164 closely printed pages in small type. Its purpose was, and it resulted in showing, that the jurisdiction over trusts for charities, where there was no trustee or one not competent to take, was the ordinary jurisdiction over trusts of any and every kind. It did not depend on any statute or prerogative, or arise out of either. If the object could be ascertained, it was absolutely unimportant whether there was any one competent to take at law or not. There the devise was to a treasurer of an unincorporated religious society *for the benefit of the Indians*, and a bequest to the *citizens* of a town in a foreign country, *to purchase a fire engine* and

¹ It would be a curiosity indeed to see how from the statute an equity can be deduced. One might as well look for equity in a commission of Oyer and Terminer. The thing is impossible if only the statute is read.

keep it in repair, and these were held valid, though the persons named as devisees could not take at law, and there was no person named to select the engine. The demonstration that the 43 Eliz. had nothing to do with this jurisdiction is found on p. 394; that the right was administered by the ordinary rules and principles of the Court (p. 598). The prerogative is discarded on p. 403. It is by virtue of one of the inherent powers of Chancery, *proceeding as a Court of Equity*, according to equity and good conscience (p. 404). Tradition tells us six months were given up to the preparation for this wonderful judgment. There is said to have been a prediction of what the Records in the Tower would disclose if examined, which was verified as to what the jurisdiction had been and how it had been exercised from time immemorial by the "Record Commission Publication."

When, therefore, we are told that this jurisdiction, which recognizes an object or purpose, if it be charitable, as a person for the purpose of sustaining a devise, was an invention of "ecclesiastics," we must ask: Is that phrase used to stigmatize the jurisdiction, and if it is, why not the invention of the same persons of the mode of compelling the execution of any trust and of fastening it on the property, in place of leaving the party to an action? Surely one may weigh in the balance the relative merits of a mind that can see that the real beneficiaries are the persons whose miseries will be alleviated by means of the use of property, and that corporations or trustees to manage the fund and select the patients to be treated are precisely what guardians or trustees for infants are—mere machinery to execute the purpose of the giver or administer property, with those who can find in the want of such machinery a good reason for destroying the right of the beneficiaries in the one case, but not in the other. And it may be that the despised and contemned "ecclesiastics" will turn the balance for largeness of mind and comprehension of what that is or should be, by which mankind are governed and their property disposed of, which we call law. Which law is more worthy of a seat in the bosom of God? It may be that such a

decision as the one cited has escaped observation, but it seems impossible that such a case as that of Mr. Girard's will could have been overlooked. It could not have been studied in any proper sense of that word. Above all, it is quite impossible that the great argument could have been even looked at.

The point of the case mentioned must be carefully borne in mind, and it is not to be looked for merely in the judgment. It could scarcely be expected that Judge STORY should have brought out in very vivid colors the fact that not only was his Court absolutely wrong in the great case of *Baptist Church v. Hart*, but that he had volunteered a most learned note on the subject which was all wrong too. During the argument he had the good taste to hand to Mr. BINNEY a decision of SUGDEN'S, then Chancellor of Ireland, confirming all that he was contending for; although in so doing he, STORY, was convicting himself of error. As it is quite evident that *Vidal v. Girard* has not been appreciated, possibly not looked at, it may as well be stated. The devise was to a municipal corporation as a trustee, to build a school, and select the scholars, first, from the city, second, from the county, third from New Orleans, and fourth from the world at large, and then educate them. It was also quite clear—it was not disputed—that the trustee was utterly incompetent to take the property and act as trustee. And why? It is impossible to conceive anything more incongruous than that a political corporation, the membership of which is compulsory, and which is maintained by compulsory taxation only, can assume the duty and the peril of a trustee—apart from what is the complete objection—that it must act by agents, which a trustee cannot do. If a more grotesque incongruity in relations can be suggested than this—of a political corporation acting the part of a trustee—it is at least hard to find. The sanction by the legislature was *after* the death. No one pretended in *that* argument to rest the case on that. It was met—as that lawyer met all his cases—by discarding all that was not certain.

If the devise required for its validity the intervention

of a trustee to be named in the will, it was void. That it required a trustee to make the work possible was, of course, admitted. This rule of law relied on was the common law, independent of statute, prerogative, or any other consideration, than that there was a *charitable use*, and equity, as part of the law—and *that the universal English law*, which came here with the colonists—not a prerogative power unfitted for freemen. The outline of the argument is given to show that every reason alleged in the Tilden case, as the foundation of the jurisdiction which alone support such trusts, was not only abandoned but disclaimed at the outset. Mr. Binney well knew his argument would only be weakened by any claim on the ground of ecclesiastical polity or religious sentiment or prerogative power. He claimed under a system that had never had a Court of Chancery, nor knew any other equity than such as was believed to be capable of being administered by a court having its jurisdiction thus defined, *that of the King's Bench at Westminster*. That is that simple rule which recognizes law and equity as parts of the one system called law, for determining rights of property. His points were :

First.—That the error of the Courts of Virginia and Maryland required a statement of only the most elementary principles to expose it.

Second.—That at *law* as distinguished from equity there could never exist a title except in a person capable of ascertainment, in whom all duties and in whom all rights must vest at the death of the owner.

Third.—No claim is set up, because the will in every sense defines the objects to be benefited. If a trust for poor orphans generally, or poor children, or poor seamen, or for the members of any class of the helpless or necessitous, however general the description, cannot be supported, neither can this trust ; nor will a suggestion be offered to distinguish Girard's trust from these in favor of the former.

Fourth.—Uncertainty of persons to enjoy, until appointment or selection, is a *never-failing attendant of a charitable trust*.

It is impossible to put a proposition more evidently true

as to all charities, or more distinctly contradictory to that on which the decision in the Tilden case rests, so far as any law other than local law not derived from England, is concerned, and none that more distinctly shows the absence of even an apprehension of the true meaning of *uncertainty*, when applied as a test of the validity under the law of England, of a grant, whether by deed or will. Can a charity be described which by its terms makes it possible to define a person by name as entitled to the benefit, without the intervention of a power to select? If this person is ascertained by the terms of the will then the gift creates private property. All are familiar with cases where this very thing created the doubt as to the intention.

Fifth—A gift to a class, such as the blind or orphans, if charitable, is as effectual as a gift to the children of A. for their own benefit.

After citing some authorities, he says: "Here are ten cases, all before the 43d Eliz., all of a solemn character, and all of them incontestably clear to the point, that perpetual charitable uses—for the poor, for the poorest of the six nearest parishes; for poor men, decayed and unfortunate or visited by the hand of God; to find a preacher in such a place: for the maintenance of a master and usher of a free grammar school; for a free school; for almsmen and almswomen—are good, lawful and valid uses *by the common law of England*." Then in answer to the supposed necessity of a vesting of a legal estate to maintain this equity: "There is no court in England that has ever held such uses to be void. I do not say that there is none to show that a *legal estate to uses may sometimes be void*, but as to the uses themselves, until the Mortmain Act of George II, there is not an instance, there cannot be one. The general law of England in matters of charity thoroughly carries out the language of the Apostle, 'Charity never faileth,' and equity not only declares the same thing but makes it effectual."

Sixth.—Two other propositions are then stated the exact reverse of the postulates of Mr. Justice BROWN: (a) the beneficiaries are the real owners, the trusts for them being lawful, the incapacity of the trustee or the want of one is

of no moment; (b) the defendants are entitled, upon general principles, and by the constitution of a Court of Equity, to have their valid trust protected in this Court, whatever may be the defects of the legal estate, whenever the Court recognizes the rule that a trust shall not fail for want of a trustee. Has any one ever heard that phrase qualified by the exclusion of charities?

The cases support this as an universal proposition—that all trusts rest on the same foundation, and the proof is that the thing or property is bound. The authorities are beyond the suspicion of being formulated by “mediæval ecclesiasticism.”¹ The application of the rule to charities are all cases, since the revolution in 1688, except one by Finch,² and that was a devise of “tithes impropriate to the curate and to all that should serve after him.” The devise being void, the heir was declared a trustee.³

Seventh.—It is part of the *original jurisdiction*. It is here (p. 114) Mr. BINNEY mentions the *one solitary dictum in 1798* of Lord LOUGHBOROUGH, that questions the original jurisdiction of equity in cases of charitable trusts before the statute.

It would be unreasonable here to repeat all these authorities. They demonstrated the fact thus—by deciding there is no jurisdiction under the statute, and directing the litigation to be instituted in Chancery. Judge BALDWIN's opinion is a demonstration that the statement attributing the jurisdiction to the statute is a mistake of FACT. If it were only remembered that the statute was, as stated by Sir ORLANDO BRIDGEMAN,⁴ designed to create a more effectual system for administering charities and hunting up fraudulent trustees, the wonderful mistakes as to its effect would have been avoided. The title to the act really indi-

¹ Co. Litt., 290 b; Mr. Butler's note, 113 a; Mr. Hargraves' note, and a string of decisions.

² 2 Ventris, 349.

³ That the Statute of 43 Eliz. has nothing to do with this rule, see 2 My. & K., 581; Shelford, 630. There is also a case (1 Eden, 10) where it is thus stated: “A void conveyance was aided before, during and since the statute.”

⁴ 1 Ch. C., 157.

cates its intent: "It is an act *to redress the mis-employment of lands*, etc., *heretofore given* to charitable uses." It then creates a commission and gives them power to inquire into and redress wrong. As Mr. BINNEY remarks: "It has been abandoned as useless and inconvenient, and the ordinary jurisdiction resorted to." Can it be supposed that such a statute was intended to give validity to past transactions that, being illegal, were void?

It would seem that there was, on the part of Judge WRIGHT and Judge BROWN, forgetfulness of an important fact in the judicial history of England, that the contest and doubt as to the power of the Chancery to disregard the forms of law, when they made plain legal purposes impossible of execution, were not confined to charities. Long after this jurisdiction had been applied to that class of devises, the question arose, in 1675, as to mere private interests, the effectuating of which required the intervention of some one, and there was no such person named. A will devised lands to be sold and the proceeds distributed between the heir and three nephews.¹ Observe the facts, and compare them with the position deemed fatal by Judge BROWN. He says: "The Tilden trust (the beneficiary) takes nothing by the will," and evidently thinks this vital. In *Pell v. Pelham* there was no estate or property in the land given to the devisees that was owned by the testator or passed by the will. There was a power by inference and no one named to exercise it. There was a direction, but it was given to no one. This was all.

At the present day it is quite probable many really good lawyers would not even be able to see that there was any question either as to the rights or the mode of getting at them. Yet the best lawyer of that day could see neither right nor remedy. Neither could there be except through equity. The Lord Keeper dismissed the bill to enforce the direction, *because no one was named to execute the power*. The Lords declared the *heir* must sell and distribute the money. This is now so commonplace that we would call the rule self-evident.

¹ *Pell v. Pelham*, 1 Levinz., 309.

Now is it not plain—it is not certain—that there is nothing in the fact that the beneficiaries take nothing, or that their right depends on the power of the Court to compel somebody to deal with *what is his estate by law*, as if he had been made a trustee for that purpose and had accepted the trust, though he does not take under the will?

As to this portentous monster called Cy-pres—and the prerogative—let us consider what it means before first insisting on its necessity and then on its illegality. Under this head or title *when the Court exercises the so called Cy-pres power as a Court of Chancery, and as distinguished from the power under the prerogative*, we find that the Court cannot vary a charity if it is defined, merely because it is useless.¹ But when there is a devise to “such lying-in hospital as his executor might select,” and there was no executor, the Court selected.² “All and every the hospitals” include all in the town.³ A devise for augmentation of collections “for the benefit of poor Dissenting ministers;” “a devise to a particular charity which was dissolved before the death of the testator;” blanks left for the names of the charities; “to the poor,” all come under the ordinary jurisdiction of trusts.

The distinction between the cases in which the Court or the Crown act is so fine that it seems to have escaped attention. It is this: *In those cases where the testator has evinced no intention to commit the disposal of his property to any one*, there the object or purpose creates a valid gift, but it is executed by virtue of the power of the Crown under the sign manual; but if there are or were intended to be trustees, the power is in the Court.⁴ The subject is thoroughly discussed in *Moggridge v. Thackwell*;⁵ but the distinction is not because of prerogative; it is because in the former case the trustee is the king, and he is not amenable to the jurisdiction. It is because the king takes as *constitutional trustee*⁶—as a trustee for property where there is a beneficiary but no legal owner. See 4 My. & K., 584, for an admission as to this being the point decided.

¹ Boyle, 162; Atty.-Gen. v. Manfield, 2 Russ., 501.

² Boyle, 170.

³ *Id.*

⁴ Boyle, 213.

⁵ 7 Ves., 83.

⁶ *Id.*, 83.

Certainly, one may be permitted to express astonishment that such conclusions could possibly be drawn in New York from such premises. Some may recall the settlement, in *Burgess v. Wheat*, of the long-disputed question as to the effect on the equitable estate by the escheat of the legal estate because of the death of the trustees without heirs. Could an American Court be induced to sit patiently through such an argument? Yet it is this very thing, only in another form, that raises up this unknown and, therefore, fearful creature, prerogative, as if the duty to give property to the real owner, because the legal title vested in the Crown ought not to extend to republics. Or as if a Court is not entitled to say that when there is a devise to A., in trust for B., the Court will recognize B.'s title if A. happens to die without heirs or has forfeited his estates for felony. Is it to be wondered that even chancellors occasionally overlooked foundations for their decisions and thought only of the question who was the owner, and not how the Court got the right to give him his property?

The only question then is, it being essential that there must be a beneficiary ascertained or ascertainable, are the purposes declared in the Tilden will sufficient for this purpose? It is quite unnecessary to discuss the question as to the power of the Court when no purpose other than a charitable one generally is stated. For, so far as the Tilden Trust is concerned, that purpose is a library and reading-room in a city, and it is admitted it is a charity, and the supposed difficulty is identical with that in the case of the Sailors' Snug Harbor, and there the question arose at common law and not in equity—the devisees were incapable of taking, and the distinction is that there there was a direction to apply, while in Mr. Tilden's will there is only an authority or power to apply to the legislature for powers. If that could be compelled (about which it seems difficult to conceive that there can be a doubt) the distinction relied on does not exist. The objection was the same in both cases; it was optional in both cases. In the one case the option was with the legislature to grant; in the other in

the trustees to apply—*i.e.*, there is a distinction—there is not a difference.

The alternative trust is *any wide and substantial benefit to the interests of mankind*. The considerations drawn from this may be dismissed, (1) because no stress is laid on it, but it is coupled with the former and agreed to be a charity in the sense of the English rule. No attempt is made to bring it within the rule in *Maurice v. Bishop of Durham*. (2) The fact that the alternative power was illegal could not make void the one that was legal.¹ A reference to *Chamberlain v. Brockett*² has induced a suspicion that the devise in the Tilden case may have been supposed to be on a condition precedent, and, as was there stated by Lord SELBORNE, if that was a thing which might not certainly happen within the period limited by law, the devise would be void for indefiniteness. The condition there was, if somebody should happen to furnish land for the building. But the fact that the property was devoted to charity made this quite unimportant. So that it is evident the Court of New York rejected the general intention to create a charity, though there were persons named to devise a scheme, and that the Court treats the discretion in selecting as a condition precedent to the vesting. If this be so, it is obvious that a direction to distribute among named charities then established is made void by conferring on the trustee either the power to select or the power to determine the amount each shall have. And further, the same result must follow if, in place of charities, the beneficiaries are children of a particular person. The reference to the *Cy-pres* doctrine might still further be noticed. There have been very wrong things done in the name of that doctrine, certainly; but one may venture to doubt if any one who sneers at the rule is aware of its meaning, and has not mistaken a few abuses for the rule. That it has no possible bearing on this case is beyond question. It only really applies where the *purpose of the founder is changed*. It has no possible application to a case where the purpose of the founder can be executed.³

¹ 2 M. & Keen, 576.

² L. R., 8 Ch., 206.

³ Boyle, 150.

But there has been more than enough said to show that it is a mere bugbear—horrible only because unknown.

So far as the Tilden case is concerned, if the doctrine of Courts of Equity in reference to charitable uses is supposed to be unfit for freemen, in the ordinary case of its application, one might appeal to the common sense and the universal practice of mankind. What ought to be done with a fund given to charity, where the purpose has ceased—such as the redemption of prisoners from the Barbary States, or the disseminating of information as to slavery in the Southern States? There is no more conspicuous application of the doctrine of Cy-pres than is found in the case of Dartmouth College *v.* Woodward.¹ The foundation was for the education of the Indians and for the civilizing and Christianizing of the children of pagans. The funds were contributed for the spreading of knowledge of the only true God and Saviour *among the American savages*.² The institution was converted into an ordinary college for the education of the youth of the State because the objects had ceased to exist. It is true that the Court was not asked to do this, but the trustees nevertheless did it. The point decided was that the State could not vary the charter authorizing this in respect of the mode used in selecting the administrators of the charity, though it was used to educate their own youth. No one had ever questioned the right to divert the funds from their original destination to another and analogous purpose, because the original purposes were no longer possible.³ Surely, this was better than embezzling them, which was the alternative.

The only possible excuse for not appointing a trustee for a purpose or object is the absence of a person named having a *locus standi* to ask the intervention of the Court. What can be said in defence of a destruction of a public benefaction on such a ground, but that the State is regardless of its duty, if such be its law?

In the Tilden case there were such trustees, and the machinery was perfected, and if there had been no such persons it was absolutely immaterial. All is lost—all this

¹ 4 Wh., 524.

² P. 535.

³ See Mr. Webster's recital of the facts, p. 552.

most beneficent, most magnificent dedication of property—this splendid monument to the owner, and upon reasons such as have been pointed out! It cannot be denied that they are technical. They could not be otherwise, whether right or wrong, but they are so technical that the common mind must fail to grasp them; if well founded they are technical in the worst sense. An authority to ask for the machinery, and a duty to ask it. This divides the good from the bad. Can we, governed by such niceties, afford to sneer at the schoolmen, or at the mediæval ecclesiastics who laid the foundations for that jurisprudence which has so certainly commended itself to men that when the rules of property and the rules of evidence recognized in equity differ from those of the law, the former must always prevail? This is the English notion of that which is the creation of their lawyers without the aid of one iota of legislation. Did any system of law ever before receive such a crown, such a proof of admitted superiority from those who understood the subject?

If, then, there are any provincial reasons that have even unconsciously compelled a departure from the law that our English forefathers brought with them, it may be accepted as certain there is not the faintest proof of anything in the law for the past three centuries that can be twisted into a support of that departure, and the decision in the State of New York must be reorganized as quite as local and provincial as one on the custom of Cornwall; indeed far more so, for that, while provincial in England, is in accord with the mining law of all countries and all times.

This paper may most aptly be concluded by a quotation from the close of the argument so frequently referred to already. In winding up his argument (which Judge BALDWIN said could not be reported, for even he, familiar with the subject as he was, found himself left behind if he ventured to make a note), Mr. BINNEY said: "Thus stands the law of Pennsylvania on the subject of charitable uses, and so, I trust, it ever will stand. While we do not ask to impose it upon other States against their will, we are happy that the adjudications of this Court, over and over again

pronounced, bind them not to disturb its operation upon ourselves.

"In two of the States of this Union, the decision in the Baptist Association *v. Hart's Executors*, seems to have been adopted, and indeed to have been carried beyond the precise limits of that judgment, which only refused to establish a charitable use for education, bequeathed to an unincorporated association, incapable of taking at law; and did not, except by the reasoning of the Court, touch the case of a bequest of the same nature to competent trustees. Such cases, however, have since fallen before the judgments of Courts of Chancery, both in Maryland and Virginia. The Maryland doctrine is to be found in *Trippe v. Frazier*,¹ and *Dashiel v. the Attorney-General*.² The case of *Gallego's Executors v. Attorney-General*,³ in the Court of Appeals of Virginia, adopted the same doctrine, and rejects charitable uses, whether there be competent trustees or not, if the objects of the charity are uncertain, in that sense which calls for selection at the discretion of anybody. But I think I cannot be mistaken in saying as to all these cases, that the learned judges adopted as the basis of their judgments the error in point of fact, which led to the judgment in the Baptist Association *v. Hart's Executors*—namely, that the law of charities originated in the 43d Eliz., and that, independent of that statute, a Court of Chancery cannot by its ordinary jurisdiction sustain a charitable use, which, if not a charity, would on general principles be void.⁴ What influence the fact of the original jurisdiction of Chancery, as it now appears, would have had upon the respective courts; if it had been shown to them, it is of little use to conjecture.

"In the other States the result has been uniformly otherwise. I regard it as impossible to select from any judicial reports a body of more thoroughly able and learned arguments by both counsel and judges, than are to be found on this question in the various reports of cases to which

¹ 4 Harris & J., 446.

² 5 Harris & J., 392; Same *v. Same*, C. Harris & J., 1.

³ 3 Leigh, 450.

⁴ Vid. 5 Harris & J., 398; 6 Harris & J., 7; 3 Leigh, 468.

the Baptist Association *v.* Hart's Executors has given occasion.¹ . . . In eight States, therefore, the law of charitable uses is held, as it is held in Pennsylvania, and I cannot but regard it as a public misfortune to those States where it is held otherwise."²

SUPREME COURT OF ILLINOIS.

LAKE SHORE & M. S. RY. CO. *v.* BODEMER.³

SYLLABUS.

The engineer of a railroad company, while driving his locomotive through a crowded portion of a large city at a rate of speed greatly in excess of that allowed by ordinance of the city, struck and killed a young boy, who was a trespasser. The tracks of the company at the place where the accident occurred, were laid on ground belonging to the company, but they were not fenced in, and on each side of them was a public way. The engineer could have seen the boy when one hundred and twenty-five feet away from him, but no bell was rung, and, according to the weight of the testimony, no whistle was blown until the locomotive was but a few feet from the boy. Held: That it was for the jury to say whether under the circumstances the engineer was guilty of such wanton and wilful negligence as would allow plaintiff, the administrator of the boy, to recover damages in spite of the contributory negligence of the boy.

STATEMENT OF THE CASE.

Appeal from the Appellate Court of the First District.

This was an action on the case brought by Philip

¹ Mr. Binney here says: "In Massachusetts there are, beside the prior cases of *Bartlett v. King's Executors*, 15 Mass., 537, and *Trustees of Phillips' Academy v. King's Executors*, 15 Mass., 537, the case of *Goring v. Emery*, 16 Pick., 107; *Burbank v. Whitney*, 24 Pick., 146, and *Bartlett v. Nye*, 4 Metcalfe, 378. In Maine, *Shapley v. Nissbury*, 1 Greenl., 271. In Vermont, *Burr's Executors v. Smith*, 7 Verm. Rep., 241. In New York, *Coggeshall v. Nelton*, 7 John Ch. Rep., 292; *McCartie v. Orphans' Asylum*, 9 Cowen, 437; *Baptist Church of Hartford v. Witherill*, 3 Paige, 300; *King v. Woodhull*, 3 Edw., 79; *Potter v. Chapin*, 6 Paige, 640; *Reformed Dutch Church v. Mott*, 1 Paige, 77; *Pearsall v. Poast*, 20 Wendell, 119, and *Wright v. Trustees Methodist Episcopal Church*, 1 Hoff, 302. In New Jersey, *Ackerman's Executors v. Legatees* cited in the report of *Shopwell v. Hendrickson*, Vol. III, 9, which is itself a full authority for the same doctrine. In North Carolina, *Griffin v. Graham*, 1 Hawks, 96. In Ohio, *McIntyre Poor School v. Zanesville Canal Co.*, 9 Ohio, 203."

² Argument of H. Binney, *Girard's Will Case*, p. 185.

³ 29 Northeastern Reporter, 632, decided Jan. 18, 1892.

Bodemer, as administrator of the estate of his son, Philip Bodemer, Jr., to recover damages for the death of the latter. The facts of the case were as follows: At the place where the accident happened the tracks of the appellant ran north and south at right angles to Twenty-fifth and Twenty-sixth Streets, along Clark Street, in the city of Chicago, on ground owned by the defendant. On each side of the tracks was a public way ten feet wide, and the tracks were not fenced in. The tracks were crossed by Twenty-fifth and Twenty-sixth Streets, on which there was much travel at the locality in question. The deceased, a boy about nine years old, and his brother, about twelve years old, came to Twenty-fifth Street from the east at the time of the accident, which cost decedent his life, to cross the tracks there. A long and noisy freight train was going southward on one of the eastern tracks, and the boys walked southward along the alley east of the track till the last car of the freight train had passed. The elder brother then crossed the tracks in safety, going to the west, but his younger brother, while attempting to follow, was struck and killed by the engine of a passenger train going at a high rate of speed to the north on one of the tracks west of the one on which the freight train had just passed.

The only count in the declaration that was left to the jury alleged that the defendant was driving its locomotive toward a certain point on its railroad near the crossing of Twenty-fifth Street; and while the deceased, who was a minor under the age of ten years, was

"then and there, at said aforementioned point upon said railroad, attempting to cross said railroad," the engineer, although he knew that persons were in the habit of passing across and along the track at and near said place, between Twenty-fifth and Twenty-sixth Streets, "and although, while at a great distance from said certain point aforesaid, upon the railroad of the defendant, he saw divers persons near to that track of defendant's railroad upon which he was at that time driving his engine, and although he saw said Philip Bodemer, Jr., upon and between said tracks, upon which he was at that time driving said engine, said Philip Bodemer, Jr., being at that time at a great distance from said engine, yet the said servant of the defendant wantonly, recklessly, and with gross negligence drove said engine and train at a very great rate of speed along and upon said railroad of the defendant, and toward said Philip Bodemer, Jr., and

toward and across said certain place, and did not make reasonable or efficient effort to avoid causing his said engine to strike the said Philip Bodemer, Jr., nor did he give adequate, sufficient, or timely warning to the said Philip Bodemer, Jr., in order that he might avoid being injured by the approach of said engine, and by and through the gross and wanton negligence and improper conduct of the defendant, the locomotive struck the deceased and killed him."

The evidence showed that the engine of the defendant was being driven much faster than was allowed by an ordinance of the city of Chicago, and that the engineer could have seen the boy when one hundred and twenty-five feet away from him. No bell was rung, and according to the weight of the testimony no whistle was blown till the engine was within a few feet of the boy. It was admitted that decedent was a trespasser on the tracks of the defendant when he was killed. The other facts in the case are set forth sufficiently in the opinion of the Court.

The Court below left it to the jury to say whether injury was inflicted wantonly or wilfully, or with such gross negligence as showed wilfulness. The jury found for the plaintiff, and the defendant then took the present appeal, assigning as error the refusal of the Court to instruct the jury to find for the defendant.

OPINION OF THE COURT.

MAGRUDER, C. J. : It is assigned as error that the trial court refused, at the conclusion of the testimony on both sides, to instruct the jury, as then requested by the defendant, to find for the defendant. The position of the appellant is that the deceased was a trespasser upon its right of way, attempting to cross the tracks where there was no public crossing. It has been held that, where a trespasser upon the tracks of a railroad company is injured, the company is not liable unless the injury was wantonly or wilfully inflicted, or was the result of such gross negligence as evidences wilfulness. By withdrawing the first, second, third and fourth counts from the consideration of the jury, and submitting the case upon the fifth count, the Court assumed that the deceased was a trespasser at the time of his

death, required the jury to find that the injury was inflicted wantonly and wilfully, or with such gross negligence as showed wilfulness.

The evidence of the plaintiff tended to show that there were public street-crossings over appellant's tracks at Twenty-sixth, Twenty-fifth and Twenty-fourth Streets; that the passenger train, which struck the deceased, was travelling at the rate of from thirty to thirty-five or forty miles an hour; that there were no gates where Twenty-sixth Street crosses the tracks; that the tracks were laid upon what was called "Clark Street," running directly south from Twenty-second Street; that there were two roadways along the east and west sides of the tracks; that there were no fences between these roadways and the tracks; that the public drove along these roadways, running north and south, with wagons, and people passed up and down upon them; that wagons drive up to the tracks upon these roadways, between Twenty-sixth and Twenty-fifth Streets, and unload the cars standing there on the tracks; that "the wagons do not drive in there between the tracks except when they are unloaded;" that there are houses on the east side of the tracks; that upon the west side of the tracks, fronting upon the strip of ground called "Clark Street," and consisting of the two roadways and the tracks between them, are a saloon, a rag-shop, carpet-shop, stone-yard, packing-house and ice-house, all located between Twenty-sixth and Twenty-fifth Streets; that many people pass there, going across the tracks to the rag-shop and packing-house every day, and no bell was rung on the engine of the passenger train which killed the deceased; that a whistle was blown twice, giving two short, sharp sounds, when the engine of the passenger train was about five or ten feet from the deceased, or, as some of the witnesses express it, that the deceased was struck at the same time when the whistle was blown; that the deceased when struck was thrown into the air several feet; that the engine which struck him did not stop until it reached Twenty-fourth Street, about two blocks north of the place of the accident; that three boys who were on an empty

freight car standing on a track about a car length south of Twenty-fifth Street witnessed the killing of the deceased, and one of them saw him on the tracks before he was struck.

We are unable to say that there was not evidence enough to justify the Court in leaving it to the jury to say whether or not the boy was killed by the wanton and wilful negligence of the company. The company introduced no evidence whatever to contradict the testimony of the plaintiff, except for the purpose of showing that the strip of land occupied by the tracks between Twenty-fifth and Twenty-sixth Streets was its private right of way, and not a public street. In answer to written questions calling for special findings, submitted at defendant's request, the jury found that the tracks were straight for a considerable distance toward the south from the place of the accident; that a locomotive approaching that place from the south could be seen a distance of 1,000 feet; that the deceased did not step from behind the freight train immediately in front of the engine of the passenger train, but that he was about 125 feet from the engine when he stepped upon the track. The jury answered, "We cannot say," to the question, "Did the engineer have time to stop the train, after seeing deceased, and before striking him?" It was the duty of the engineer to exercise ordinary care to avoid striking the deceased, even if he was a trespasser. If it was impossible to stop the train in time, it may yet have been possible to have warned the plaintiff of his danger in time to enable him to get out of the way. The engineer "must use all the usual signals to warn the trespasser of danger."¹ If the boy was 125 feet from the engine when he stepped upon the track, did the engineer see him? It was for the jury to answer this question. The company did not produce the engineer to say that he did not see the deceased, nor did it introduce any evidence upon that subject. It is not necessary to show by affirmative testimony that the engineer's look was directed toward the boy. It is sufficient, if it appear from all the circumstances that he might

¹ 2 Shear. & R. Neg., 4th ed., 483.

have seen him by the exercise of reasonable diligence and ordinary prudence. Why did he not see him? The track was straight and clear and unobstructed for a long distance. Others saw him. The boys on the freight car were distant more than 125 feet, and one of them saw the deceased standing . . . on the track, right between the rails, not quite in the middle." If the engineer saw the boy when he was at a distance of 125 feet, did he give him the signal of danger as soon as he ought to have given it? One witness standing on Twenty-sixth Street, and waiting for the freight train to pass, swears that he heard the whistle blow at the crossing. His testimony tends to show, however, that the engine had passed Twenty-sixth Street before the whistle blew, and how far it had passed does not appear. But three witnesses swear that when the whistle sounded the engine was near enough to strike the boy, or only five or ten feet from him. It was for the jury to weigh this evidence, and consider its bearing. If they believed from the evidence that the engineer saw the boy, and thereafter waited until the sound of the whistle could do no good, when, by whistling as soon as the deceased came upon the tracks, he could have warned him in time to enable him to escape, they were justified in finding for the plaintiff.

The jury were authorized to look at the conduct of the engineer in the light of all the facts in the case. It has been said: "What degree of negligence the law considers equivalent to a wilful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement."¹ In *Railroad Co. v. Godfrey*,² we said that when a trespasser is injured, the railroad company is liable for "such gross negligence as evidences wilfulness." We said the same thing in *Blanchard v. Railroad Co.*³ What is meant by "such gross negligence as evidences wilfulness?" It is "such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness."⁴ It is

¹ 2 Thomp. Neg., p. 1264, par. 53.

² 71 Ill., 500.

³ 126 Ill., 416.

⁴ 2 Thomp. Neg., p. 1264, par. 52.

such gross negligence as to imply a disregard of consequences, or a willingness to inflict injury.¹ In *Harlan v. Railroad Co.*,² it was said: "When it is said in cases where plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company fail to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity." Contributory negligence, such as that of a trespasser upon a railroad track, cannot be relied on "in any case where the action of the defendant is wanton, wilful or reckless in the premises, and injury ensues as the result."³ "Under the rule conceding the right of a free track to a railway company, in the event of an injury to a trespasser upon its line, it can be held liable only for an act which is wanton, or for gross negligence in the management of its line, which is equivalent to intentional mischief."⁴ Although the plaintiff is guilty of negligence, he can recover if the defendant could have avoided committing the injury by the exercise of ordinary care."⁵

Let these principles be applied to the facts of the case at bar. The train which committed the injury was traveling at the usual speed of thirty-five to forty miles an hour in the crowded city of Chicago; over street-crossings; upon unguarded tracks, so connected with a public street and so apparently the continuation of a public street as to be regarded by ordinary citizens as located in a public street; along a portion of such tracks where persons were known to be passing and crossing every day; in conceded violation of a city ordinance as to speed, and without warning of the approach of the train by the ringing of a bell. This con-

¹Deer. Neg., par. 29.

²65 Mo., 22.

³*Baumeister v. Railroad Co.* (Mich.), 30 N. W. Rep., 337; *Banking Co. v. Denison*, 84 Ga., 774.

⁴1 Thomp. Neg., 449.

⁵Deer. Neg., par. 30.

duct tended to show such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness. It also tended to show that if there was failure to discover the danger of the deceased, such failure was owing to the recklessness of the company's servants in the management of its train. We are of the opinion that the Court committed no error in refusing to instruct the jury to find for the defendant.¹

Appellant assigns as error the admission of testimony that persons were in the habit of passing across the tracks at the place where the accident occurred. In cases where persons have travelled along a railroad right of way as a mere footpath, using it for their own convenience, and where there was no evidence of any assent of the railroad company thereto except its non-interference with the practice, it has been held that such persons are to be regarded as wrongdoers and trespassers, and that a mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident.² But in each of such cases it was conceded that the place where the injury occurred was upon the right of way of the railroad company, and that the party making use of such right of way knew it to be the exclusive property of the railroad company for the purpose of running its trains. But in the case at bar the testimony of the plaintiff tended to show that the tracks at the point where the deceased was killed were laid in Clark Street, a public street of the city of Chicago. There were travelled roadways constantly in use on both sides of the tracks, and several witnesses testified that the strip of land which embraced the tracks in the middle and the roadways on the sides was called Clark Street, and regarded as a public street.

When the evidence on the part of the plaintiff had closed, the defendant introduced proofs tending to show

¹ Railroad Co. v. Gregory, 58 Ill., 226; Railroad Co. v. Galbreath, 63 Ill., 436.

² Railroad Co. v. Godfrey, 71 Ill., 500; Railroad Co. v. Blanchard, 126 Ill., 416; Railroad Co. v. Hetherington, 83 Ill., 510.

that the strip in question was 120 feet wide; that 100 feet in the middle of the strip where the tracks were laid, was railroad right of way, but that ten feet on each side of said 100 feet belonged to the public, and were used by the public. The strip in question was used partly by the public and partly by the railroad company. The proofs also tended to show that for years the railroad tracks had been laid in Clark Street as far south as Twenty-second Street, though they had subsequently been moved somewhat to the westward. The course of the tracks southward was such as to appear to be a mere extension of Clark Street. There was no fence or other mark of separation to designate what portion of the strip 120 feet wide belonged to the public, and what portion belonged to the railroad. There was proof tending to show that before any tracks were laid at all there had been a footpath in use from Twenty-second Street as far south as Twenty-fifth Street. As has already been stated, it also appeared that persons were allowed to come up to the cars standing upon these tracks for the purpose of loading and unloading their wagons; and one witness stated that wagons drove upon or between the tracks for such purpose. The books draw a distinction between cases where there is a mere naked license or permission to enter upon or pass over an estate, and cases where the owner or occupant holds out any enticement, allurement, or inducement to persons to enter upon or pass over his property.¹

"A mere passive acquiescence by an owner or occupier in a certain use of his lands by others involves no liability; but if he, directly or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use; and for a breach of this obligation he is liable to damages to a person injured thereby." Though it is unnecessary to go so far as to hold in this case that the facts hereinbefore recited amounted to an implied inducement on the part of the railroad company to the public to pass over its tracks, it is nevertheless quite manifest that the surroundings were such as to give to the tracks the appearance of being lo-

¹ *Sweeney v. Railroad Co.*, 10 Allen, 368.

cated in a public street, and all the circumstances of the situation were such as to lead those who had occasion to frequent that neighborhood to believe that the tracks were in a public street; hence, we are inclined to the opinion that the Court did not err in admitting proof of the passing of persons across the tracks, for the reason that such proof was admitted before the defendant proved that the tracks were on its right of way, and while as yet the evidence of the plaintiff tended to show, in the absence of contradictory proof, that the tracks were in a public street, or what was called or regarded as a public street. If the tracks were in a public street, the company was unquestionably under obligations to "provide against the danger of accident" to those rightfully thereon. After the defendant introduced its proof, it did not move to exclude the particular testimony of the plaintiff as to the passing of persons over the tracks. Whether, therefore, after the ownership of the company had been shown, persons who had been proved to be in the habit of crossing the tracks under the belief that they were crossing a public street, were or were not such wrongdoers as to relieve the company from liability for injury to them, is a question which need not be further considered.

The appellant further objects that the Court should have excluded the ordinances as to speed and the ringing of a bell, as these ordinances were not described in the fifth count of the declaration.¹ The ordinance as to speed was described in the third count, and the ordinance as to the ringing of the bell was described in the fourth count, and they were properly admitted under these counts at the time when they were admitted. After defendant introduced its proof, it made no formal motion to exclude the ordinances, though it objected to the reading of them to the jury in the argument of plaintiff's counsel, and asked the Court to instruct the jury to disregard them as evidence. We do not think that the action of the Court in this particular, even if it be regarded as technically erroneous, could have done the defendant any harm, for the reason that counsel

¹ Railroad Co. v. Godfrey, *supra*.

for the defendant admitted in his opening statement to the jury that the city ordinance prohibited the running of trains in the city at greater rate of speed than ten miles an hour, and also admitted that the train that killed the deceased was travelling at a greater rate of speed than ten miles an hour, and for the reason that the ordinance as to the ringing of the bell was not read at all in the hearing of the jury, and counsel for defendant allowed the testimony that no bell was rung to be admitted without objection. Furthermore, the action of the Court in withdrawing from the consideration of the jury all the counts except the fifth was exceedingly favorable to the defendant. We do not think that the jury ought to have been told that there could be no recovery under the third count which described the ordinance as to speed. Even if it be admitted that the deceased was a trespasser, the third count was sufficient to authorize the proof under it of such gross negligence as evidences wilfulness. The word "reckless" implies heedlessness and indifference. If an engineer, knowing that persons are accustomed to cross a track between the streets of a large and crowded city, drives his engine forward "recklessly," that is to say, with indifference as to whether such persons are injured or not, and at the rate of speed "greatly" in excess of that limited by a city ordinance, an injury thereby inflicted upon one of such persons, even though he be a trespasser, will be regarded as the result of "such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness."

The views already expressed dispose of appellant's objections to the refusal of instructions numbered 3, 4, 5 and 8, asked by the defendant. Refused instruction number 7 was not based upon the evidence. It submitted to the jury the question whether or not the deceased was using the tracks as a playground. We find no evidence in the record tending in the slightest degree to show that the tracks were used for any such purpose. Refused instructions numbered 9, 10, 11, 12, 15 and 17 merely related to the degree of care which the deceased was re-

quired to exercise ; but as the case was submitted to the jury upon a declaration which charged wanton and wilful negligence, it made no difference to what extent the deceased was guilty of a want of care. Contributory negligence on the part of the plaintiff is no excuse for wanton and wilful negligence on the part of the defendant. Refused instructions numbered 24 and 25 assumed the existence of facts about which there was a controversy, and each singled out and gave undue prominence to a single circumstance, as characterizing the defendant's conduct, instead of leaving it to the jury to pass upon such conduct, upon a view of all the facts and circumstances in the case. The judgment of the appellate court is affirmed.

CRAIG and BAILEY, J. J., dissent.

CONTRIBUTORY NEGLIGENCE.

"Where the conduct of the defendant is wanton or wilful, or where it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of injury:" Cooley, *Law of Torts*, 674.

This wanton or wilful negligence or recklessness is not easy to define, nor is it easy in many cases to say whether or not the negligence of the particular case is such. The injury must be deliberate or wilful, or the action which caused it must be so reckless that the law regards the injury resulting from it as wilful or deliberate. If the plaintiff is placed in a dangerous position owing to his own negligence and the negligence of the defendant, and the defendant then becomes aware of the dangerous

position of the plaintiff and fails to make every effort to avoid the injury, the defendant's negligence is here wilful. No amount of negligence on the part of the plaintiff will justify the subsequent wilful negligence on the part of the defendant in such a case.

At one extreme it is very simple. If a man persists in walking along a street that is closed to the public on account of a building operation, say, and a workman engaged at the top of the building sees the man on the street below, and, in spite of that fact, drops a hodful of broken bricks into the street, taking the chance that the man will not be hit, and the man is hit by a piece, here the injured party will have his action. True, he was guilty of contributory negligence in going on the closed part of the street, but that is no excuse for the action of the workman in deliberately throwing the bricks down on top of him, and trusting that no one of them will

strike him. In a case such as this there is no difficulty, for the injury is wilful, or the result of an action so reckless that the injury is treated as if it were wilful.

But there are many cases in which the workman threw down the bricks without first looking, though, perhaps, he knew the street was used by a great many people although it was closed. Here there would not be such a total disregard of the rights of others, and the injury is not so close to being wilful as in the former case. The difficulty in these cases lies in determining just what negligence is such that the injury resulting from it will be regarded as wilful, and in determining what cases should be left to the jury to decide this fact. The case reported above seems to be very close to the border line. A review of the cases shows that the courts of the different States do not agree in the matter, and that the Central and Western States are, perhaps, more favorable to the plaintiff than the Eastern ones. The question comes up more often, probably, in the case of trespassers injured on a railroad track than in any other form. In such cases the first principle to be remembered is that "a railroad engineer is not bound, usually, to foresee the wrongful presence of any person upon the track, even where it is open to an adjoining highway; . . . but if his experience has shown that persons are thus constantly entering upon the track, . . . such persons, if injured by reason of the engineer's failure to use ordinary care to keep watch for them, may recover damages if the engineer could have seen them without difficulty, had he kept a reasonable watch, even though, in point of fact, he did not

see them:" *Shearman & Redfield on Negligence*, 4th ed., § 484. The second principle is that "the law presumes that a person walking upon a railroad track will leave the same in time to prevent injury from an approaching train of which he has knowledge or should have by the ordinary use of the senses of hearing and seeing, and the managers of the train may act upon this presumption:" Per *STAYTON*, C. J., in *I. & G. N. Ry. Co. v. Garcia*, 75 Tex., 591. The third principle is that "although a man may be unlawfully on the track, may be a trespasser, the employees of the company would have no right to carelessly and negligently run over him after his presence and danger became known to them." Per *MAXEV*, J., in *Saldana v. Galveston, H. & S. A. Ry. Co.*, 43 Fed. Rep., 862. *STONE*, C. J., lays down the law in such cases very clearly in *S. & N. R. Co. v. Black*, 89 Ala., 313. A person on a track must employ his eyes and ears to discover an approaching train, and if he fail to do so he is guilty of contributory negligence. When the engineer discovers a person on the track who from appearances is a person of discreet years, he is justified in supposing that such person will see or hear the locomotive and get off the track, and hence in such a case he is not bound to stop or check the train in the absence of other attendant circumstances. The engineer can act on this supposition until circumstances make it apparent that the trespasser is not aware of the approach of the train, or is unable to extricate himself from the peril. But when the engineer discovers that the trespasser is unaware of the approach of the train, or cannot leave the track,

he must use every endeavor to avert the catastrophe by stopping the train. In this case the decedent, who was deaf, was a trespasser on the tracks at a place where they were straight for nearly a mile, and the engineer saw him half a mile away. When the train was two hundred yards from him the bell was rung, and when within one hundred the whistle blown; and then the engineer, noticing that decedent did not look around or get off the track, reversed the engine, but the decedent was killed. The Court held that the question of the defendant's wilful negligence was for the jury, under instructions embodying the principles laid down above.

In the case of *Central R. R. & Banking Co. v. Denson*, 84 Ga., 774, plaintiff's decedent was walking along defendant's track, and a train of defendant came up from behind him at a place where defendant's servants could have seen decedent 400 yards away. No warning was given decedent by bell or whistle, nor was an effort made to check the speed of the train till it was but a few feet from decedent, when the whistle was blown twice, and about the same instant decedent was struck and killed. Held: Defendant was "guilty of gross, wilful and culpable negligence," and plaintiff could recover in spite of decedent's contributory negligence. See also *Central R. R. & Banking Co. of Georgia v. Vaughan*, 9 So. Rep., 468.

In *Hyde v. Union Pac. Ry. Co.*, 26 Pac. Rep., 979 (Utah), a child, who was a trespasser, fell asleep on the defendant's track. The engineer saw the child when he was between two and three hundred yards away, but could not make out

what it was till within thirty feet, when he endeavored to stop the train. Here it was held that the child's father could recover. See, also, *Keyser v. Railway Co.*, 56 Mich., 559; *Gunn v. Ohio River R. R. Co.*, 14 South East Rep., 465 (West Va.). A higher degree of care is demanded of the railroad company when the trespasser is a child than when he is a grown person: *Kansas Pacific Ry. Co. v. Whipple*, 39 Kan., 531. In this case the plaintiff recovered.

Detaching cars from the engine and letting them run by themselves with so few brakemen that they cannot be stopped promptly, if necessary, is wilful negligence: *Georgia Pacific Ry. Co. v. O'Shields*, 90 Ala., 29; *Patton v. Railway Co.*, 89 Tenn., 370; *Schumacher v. St. Louis & S. F. Ry. Co.*, 39 Fed Rep., 174 (U. S. C. C., W. D. of Ark.).

In *Conley v. C. N. O. & T. P. Ry. Co.*, 12 Southwest. Rep., 724 (Ken.), a detached portion of a train was allowed to go by itself with no bell, lights or other signal of its approach, nor any one to look out for people on its track, and the defendant was held liable for the death of a person killed on the track.

In *Highland Ave. & B. R. Co. v. Sampson*, 8 South. Rep., 778 (Alabama), plaintiff sued for damages for injury to his mule and wagon, caused by an engine of the defendant. The track along which the engine came was hidden by a building, but there was an open space of twelve feet between the track and the building. Plaintiff did not stop to listen, and drove on the track when the engine was distant but thirty feet, and his mule and wagon were injured in the collision that followed. The evidence was conflicting as to how fast the mule was

going, how fast the engine was going—the witnesses varied from six and a half to sixteen miles an hour—as to whether the engine had a head-light, and as to whether it gave the signals. An ordinance limited the speed of trains to eight miles an hour at the place of the accident. Held: That the circumstances were such that the Court properly refused to direct a verdict for the defendant.

In *Piper v. C. M. & St. P. Ry. Co.*, 46 N. W. Rep., 165 (Wis.), plaintiff while going over defendant's tracks at a crossing, was struck by a train going thirty-six miles an hour, though the statutory speed was but six miles an hour. When between fifty and sixty feet from the track plaintiff looked for trains and saw none, and if the train which struck him had not been going faster than the statute allowed, he would have crossed in safety. No signal was given, and the brakes were not applied till the train was near the crossing. When the plaintiff was within forty-eight feet of track, the engineer could have seen him when the train was 1235 feet away, and the train could have been stopped in 600 feet. Held: That under all the circumstances it was a question for the jury, and that a verdict for the plaintiff would stand. See, also, *C. C. C. & I. Ry. Co. v. Harrington*, 30 Northeast. Rep., 37 (Indiana).

The deafness of the trespasser does not change the duty of the engineer, unless he is aware of this fact or has reason to presume it from the action of the trespasser: *L. & N. R. R. Co. v. Black*, 89 Ala., 313; *AVERY, J.*, in *Meredith v. R. & D. R. R. Co.*, 108 N. C., 616.

In the following cases the negligence of the defendant's employee was held not to be wilful:

In *Atkyn v. Wabash Ry. Co.*, 41 Fed. Rep., 193, a statute of Ohio enacted that a railroad company should "adjust, fill or block the frogs, switches and guard-rails on its tracks" . . . for the safety of its employees. Held: That the failure of a railroad company to comply with this law was not such "a reckless disregard of its duty" as to make it liable for an accident caused by this failure to comply with the law, in spite of the contributory negligence of the plaintiff, an employee.

In *Givens v. Kentucky Central R. R. Co.*, 15 Southwest. Rep., 1057 (Kentucky), plaintiff's decedent, a boy nine years old, was killed in passing over defendant's railroad track at a place which was neither a public highway nor a usual crossing place, though within the limits of a village. A freight train had just passed, and the decedent, without seeing the engine and tender which immediately followed it, running backward, went upon the track and was killed. The engine was not going faster than a man could walk, and the son of the engineer in charge of the engine could not see the decedent because of the tender. Held: That a binding charge in favor of the defendant was proper. See, also, *Tennis v. I. C. R. T. Ry. Co.*, 25 Pac. Rep., 876 (Kan.). See, also, *Spicer v. Ches. & Ohio R. R. Co.*, 34 W. Va., 514.

In *Woodruff v. Northern Pacific R. R. Co.*, 47 Fed. Rep., 639, it was held that where a train is not going at an unlawful rate of speed it is not wilful negligence for an engineer not to see a trespasser on the railroad company's track, though "by ordinary care and vigilance" he might have discovered the trespasser in time to have avoided the injury.

In *Toomey v. Southern Pacific R. Co.*, 86 Cal., 374, plaintiff's son, a boy eighteen years of age, was killed by a special train of the defendant while walking along the tracks at a place 150 yards from a public crossing. There was no crossing of any kind where the accident happened, and deceased was a trespasser. The accident happened in the night; and the engine, which was running stern foremost, had no head-light, nor was the bell rung or the whistle blown at the crossing as required by law. None of the employees saw deceased until after he was hurt. The Court, without a jury, gave judgment for the defendant. The Court held that the whistle and bell were for the benefit of people using the crossing, not for trespassers, hence the

failure of the engineer to use them at the crossing was not negligence as far as decedent was concerned.

See, also, *Craddock v. Louisville & N. R. R. Co.*, 16 Southwest. Rep., 125 (Ken.), where plaintiff attempted to cross in front of a train going at the rate of fifteen to twenty miles an hour—unreasonably fast—within the limits of a village, and was struck and injured. Held: That he could not recover.

See, also, *Rome R. R. Co. v. Tolbert*, 85 Ga., 447; *June v. B. & A. R. R. Co.*, 153 Mass., 79; *Johnson v. Truesdale*, 48 Northwest. Rep., 1136; *Boyd v. Wabash Western Ry. Co.*, 16 Southwest. Rep., 909; *Georgia Pacific Ry. Co. v. Lee*, 9 South. Rep., 230 (Ala.).

W. WHARTON SMITH,
Philadelphia, Pa.

EDITORIAL NOTES.

By W. D. L.

AN article on the constitutionality of the leases of the Lehigh Valley Railroad and the New Jersey Central Railroad by the Reading Railroad Company will appear in the May number of the AMERICAN LAW REGISTER AND REVIEW.

THE WORK OF THE LATE MR. JUSTICE BRADLEY.—The death of Mr. Justice BRADLEY removes one who for the past twenty-one years has been a member of "the ideal tribunal." No one but his fellow-judges, who have come in daily contact with him, can rightly estimate the extent of the influence which he had on the development of jurisprudence; for we are told that it is in the consultation-room that merit, learning and the clearness of one's ideas are best tested. No show of knowledge which one does not possess, no glitter which apes ability, can long deceive

those with whom we are engaged in a common intellectual labor. And yet, even if we did not have the testimony of his colleagues, we could not have failed to realize the weight in the councils of a court which that man must have who, like the late Justice, evinced in his written opinions such an intimate acquaintance with all branches of the common and constitutional law of his own country and with the judicial systems of continental Europe, and who showed by the accuracy of his citations in oral statements of the law during the argument of a case the wonderful retentiveness of his memory.

The members of the profession have two sources from which they can judge a judge: the way in which he conducts the business of the court while on the bench, and his written opinions. The first, in a member of an appellate court, is the lesser of the two in importance, and yet no mention of the late Justice would be complete without some notice of his marvellous aptitude for what one may call "judicial business." It was wonderful to see the quickness and unfailing accuracy with which he applied abstract principles of law to the concrete cases which came before him in the Circuit Court. The highest compliment which a Pennsylvanian could give was paid to him by one of the leading members of the bar of that State, when he said: "In the manner of Judge SHARSWOOD, Justice BRADLEY cleared the list."

But it is from his reported opinions, and especially his opinions in cases involving the construction of the Constitution, that Mr. Justice BRADLEY will live in history. In a short time, so quickly do we forget the minor points of a great man's work, by these constitutional opinions alone will he be judged. Whether, as time passes, that judgment will become more or less favorable, depends largely on whether the future members of the Court follow his conceptions of the true meaning of the important clauses of the Constitution. For with our judiciary, as with mankind in general, greatness which comes from "ideas" endures only so long as those ideas influence human thought or conduct.

Nothing will show us more clearly the point of view from which Mr. Justice BRADLEY regarded constitutional questions than an analysis of some of the opinions and dissents written by him in the more important cases which came before the Supreme Court during his term of office. To examine first

The Slaughter-House Cases.

Few cases have been considered by the Supreme Court with a more abiding sense of their importance; few seem to be fraught with greater peril to the liberties of the individual citizen; few have had such little practical effect. The reason for this will probably be found in the fact that what the Court actually decided was not, as a constitutional question, of great importance. At the same time, the opinion of the Court contained statements of constitutional law of great moment. But to-day the dicta of the minority more nearly represent the attitude of the members of the Supreme Bench than do the dicta of Mr. Justice Miller, who spoke for the majority of his brethren. That the opinion of the Court went beyond what was actually necessary for the decision of the case is evident. The majority of the Court held that the Act of Louisiana, granting to a corporation the monopoly of slaughtering cattle over a territory 1,154 square miles in extent, and containing the city of New Orleans and adjacent territory, was constitutional. The business of slaughtering cattle, the Court maintained, was under the police power of the State, and the act was a police measure, legitimately framed to protect the health of the community. Mr. Justice Bradley, who was among those who delivered a dissenting opinion, admitted that if the measure was, in its operation, well suited to protect the health of the community, there would be no doubt of its constitutionality. He, therefore, agreed with the majority of the Court on the important question of law which arose in the case—viz., whether a State could create a monopoly to carry out its health laws; but he differed from the majority on the mixed question of law and fact—whether the law of Louisiana was a law

designed to protect the health of the people of New Orleans. He did not think it was, but, on the contrary, considered the law as establishing a monopoly of an important industry, without one iota of public expediency to recommend it.

In the opinion of the Court, however, Mr. Justice Miller, after stating the law to be one designed to protect the health of the citizens of the State, went on to uphold the power of the State to grant monopolies. He says: "The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens or a corporation by the legislature of a State?" But, curiously, instead of discussing the power of the legislature to grant the exclusive privilege to carry out its police laws, he goes into the whole subject of monopolies, and upholds the power of the State to grant monopolies and privileges generally. It is this power that Mr. Justice Bradley and the other dissenting judges vehemently deny, and it is in connection with this denial that the late Justice sets forth with admirable clearness the following conception of the last amendments to the Constitution. These amendments declare that there is a citizenship of the United States, and they protect the rights which appertain to that citizenship from encroachment by the States. The rights of the citizen are the rights of free-born Englishmen. One of the most valuable is the right to carry on any trade and occupation, hampered only by reasonable restrictions. Furthermore, depriving a man by legislative enactment of his right to carry on a particular trade, is not only interfering with his right as a citizen of the United States, but also deprives him of his liberty and property without due process of law. This latter contention was dismissed without argument by Mr. Justice Miller. In his lengthy exposition of the question of "citizenship," however, that Justice advanced a radically different conception of the amendments. He thought they were, as a matter of fact, designed primarily to prevent discriminations by the State against the colored man, and, in their construction, this fact, which indicated their main object, should always be kept in view.

The only privileges and immunities which were protected by the amendments were those which affected citizens of the United States as such. Citizenship of the United States and citizenship of the State were, in his view, two different things. In the amendments those who are citizens of the States are pointed out, but the privileges and immunities of such citizenship are neither defined nor protected. The only rights which are protected from the encroachments of State legislatures are the privileges of the citizen of the United States, and these are those which belonged to the citizens of every national government. As an instance of a national privilege is mentioned the right of a citizen of the United States to go to the seat of the Federal Government. The rights of a citizen of the United States are not the rights of trade and commerce within a State. In fact, we can deduce from Mr. Justice Miller's opinion that all those rights which are exercised solely within the State, and do not pertain to the national government, are left for their protection to the discretion of State legislatures.

We hope there is little doubt that Mr. Justice Bradley's conclusion, that no State can create a monopoly pure and simple, would be adopted to-day by the Court, on the ground that granting a monopoly would be depriving the individual of his right to carry on a lawful calling, which right is his by virtue of his being a citizen of the United States, and perhaps also on the ground that it would deprive him of his property and liberty without due process of law.

Certainly, the words of the XIVth Amendment, as construed by Mr. Justice Miller, do not, as was intended, add any additional security to our liberties. The United States was a nation before the amendments; and the people of the States were members of that nation, and as such each had the right which belongs to the inhabitants of any free government to go to the seat thereof, travel from one part to another, or assemble to petition for redress of grievances. We cannot but believe that, as the importance of individual liberty becomes more and more impressed upon our minds, the following quotation from Mr. Justice Bradley's dissent will more and more fully echo our own sentiments and the sentiments of the great tribunal which he graced so long.

He says : "The mischief to be remedied (by the amendments) was not merely slavery and its incidents and consequences, but that spirit of insubordination to the national government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure and led to much unequal legislation. The amendment was an attempt to give voice to that strong national yearning for that time and that condition of things in which American citizenship should be a sure guarantee of safety, and in which every citizen of the United States might stand erect in every portion of its soil in the full enjoyment of every right and privilege belonging to free-men, without fear of violence or molestation."

This strong statement of the belief that the amendments provided for the complete protection of individual liberty will do more to preserve the name of the great jurist than probably any other single opinion of his in the reports.

The Legal Tender Cases.

The keynote of the late Justice's opinion of the powers of the Federal Government is found in his expression in the Legal Tender Cases:¹ "The United States is not only a government, but a national government." As such, he argued, it has all those powers which rightly belong and are necessary to the preservation of the nation. The real question involved in the Legal Tender Cases was with him, as with Mr. Justice Field, who dissented, whether a national republican government, in the exercise of its control over the currency of the country (with complete control over which, Mr. Justice Bradley contended, it is, as a national government invested), can incidentally take the property of one man and give it to another. This is what making bills "legal tender" means. No one can read Mr. Justice Field's dissent on this point without being impressed with its force. The question itself is one of those on which men of trained intellects will always hold different views. The power of the government to protect and preserve itself, and the right

¹ 8 Wall., 555.

of the individual to his property, are two fundamental principles in constitutional law. In the facts of the Legal Tender Cases they apparently came in direct conflict. The national government, from its nature and the duties and responsibilities which devolve upon it as defender of the people from domestic and external violence, undoubtedly ought to possess greater control over individual liberty and property than the State governments. At the same time it is equally true that there are principles of individual liberty which a national government ought not to be allowed to trample under foot. No one would pretend for an instant that the property of all men over six feet high could be confiscated by the national government on the pretence of saving the country. On the other hand, a tax on all creditors of twenty per cent. on their debts, collected when payment was made, would undoubtedly be constitutional. The facts of the Legal Tender Cases stand between these two extremes. We think that Mr. Justice Bradley was right. It is certain that the majority of the bar and of laymen approve of the decision. The value of his opinion, however, lies not in the particular conclusions to which he came from the facts before the Court, but in the point of view which the opinion adopts toward the powers of Congress. To say that this view will remain and grow in favor with the bench, the bar and the whole country, is saying nothing more than that we will continue to be one people, under one *national* government.

*Chicago, St. Paul, etc., R. R. Co. v. Minnesota.*¹

Mr. Justice Bradley differed with the majority of his brethren in his last years of service on the bench on a subject which is likely to be one of great importance during the next decade. As in the Slaughter-house Cases, the question arises out of the XIVth Amendment. It is also the result of the laws of some of the States which appoint railroad commissions, vested with power to regulate the rates of fare charged by common carriers on passengers and merchandise transported from place to place in the

¹ 134 U. S., 418.

State. In the above case the majority of the Court, Mr. Justice Blatchford writing the opinion, held, that, while a grant to the directors in the charter of a railroad of the right to regulate the rates of fare does not prevent the States from declaring subsequently, through a general law, that all rates of fare should be reasonable, yet, nevertheless, a State cannot prescribe *unreasonable* rates. And the majority further decided that the judiciary are the final arbitrators of the question, *what are reasonable rates?* If, therefore, the legislature directly fixed unreasonable rates, or the commission appointed by the legislature fixed rates unreasonable in the eyes of the Court, the act was in contravention of the XIVth Amendment, in that it deprived the railroad of its property without due process of law.

Mr. Justice Bradley, in his dissent, took the position, that since the legislature had the power to fix the rates to be charged for public services, such as the transportation of passengers and goods, it should be the final tribunal to determine whether a specific rate is reasonable. And, furthermore, the question of the proper specific rate in any case being essentially an "administrative" question, the State legislatures could constitutionally delegate the power to determine the rate of fare in any specific instance to a commission, or even to the courts. In such a case the courts would act as a commission and determine an administrative or, in other words, an *executive* question. Thus the courts became, as far as the act relating to railway fares was concerned, the executive. Under the acts of the legislature which simply provide general rules for the guidance of the courts in prescribing the rates of fare in any instance, the judges determine the rate as would a railroad commission, or the governor of a State under similar circumstances. But it was for the legislature to say who should determine in a specific instance the rates to be charged by one carrying on a public employment. The proper rate to charge is a legislative and executive but not a judicial question.

In the present confused state of our ideas concerning what is a judicial, what is a legislative, or what is an

administrative or executive question, no one can say, with full confidence that his opinion can be sustained by the trend of authority, whether the reasonableness of a rate of fare, charged by a common carrier, ultimately will be considered a judicial question, as the majority of the Supreme Court consider it, or, with Mr. Justice Bradley, regarded as a legislative question. But certainly the last position appeals to us as the more consistent of the two. The word "reasonable," applied in connection with the power of the legislature to prescribe the charges for public employments, either means something or nothing. If it means nothing, then the legislature has the right, as Mr. Justice Bradley claimed, to prescribe any rate of fare it chooses. This is only another way of saying that the rate established by the legislature, either directly or through a commission, or court sitting as a commission, is necessarily reasonable, not simply *prima facie* reasonable. The act of Minnesota, which the Court declared unconstitutional, attempted to do this very thing. The majority, therefore, took the position that when they had said in *Munn v. Illinois*, that the legislatures of the States had power to fix reasonable rates for public employments, the word reasonable meant something. The State legislatures alone being able to prescribe what is reasonable, the reasonableness of any rate becomes a fit subject for judicial investigation.

Now, the inevitable consequences of this position, while there are not palpable absurdities, are, nevertheless, to say the least, extraordinary, in the extent of the power which they place in the hands of the courts, and the way in which they tie the hands of the State legislatures in respect to subjects over which it has always been considered they had absolute control—*i.e.*, *the subjects under the police power of the State*.

For instance, it may fairly be argued that in any specific instance there is more than one rate which may be said to be reasonable, but no one can deny that there are possibilities of rates being unreasonably high as well as possibilities of rates being unreasonably low. If, then, a legislature has no right to fix anything but a reasonable rate,

suppose no rate is fixed by positive act of the legislature, and the company, under permission of the legislature to "fix rates," fixes a rate unreasonably high? The courts, in an action by a shipper who had paid an unreasonably high rate, would have either to allow him to recover, and in so doing determine what was a reasonable rate for the service of the common carrier, or affirm that the legislature, through the directors of the company, had prescribed an unreasonable rate. Whether under the Constitution of the United States the legislatures of the States can prescribe rates of fare that are unreasonable, may be a question, but it certainly cannot be open to doubt that no State court would imply that the State legislature, by its failure to specify or prescribe any rates of fare, had impliedly sanctioned any rates of fare, no matter how unreasonable, which a carrier company may choose to charge. Under the view of the majority, therefore, State Railroad Commissions that are not courts are utterly useless. Not only must their conclusions as to the reasonableness of any rate be reversed by the Judiciary, but the Judiciary possesses a right, without a commission, to declare, at the suit of any individual, that the fare charged by a railroad company is unreasonable, and, therefore, contrary to the will of the State legislature, which, as a matter of courtesy, must be presumed to have provided that the company could only charge reasonable rates.

It may be stated as a general rule that the power to do what another considers reasonable is no power at all. For the last fifty years the courts have been upholding the power of the State to make police regulations. The right of the State to prescribe what a man shall charge when he is carrying on a public employment, as a railroad or a warehouse, was based on this police power. It is now proposed to take away the power by limiting the discretion of the legislature to what the courts shall think reasonable. It seems to us that the whole theory on which the right of the State to regulate public charges is based is thus disregarded. It was thought to be based on the fact that when a man takes up an employment, whose proper conduct is

of paramount interest to the community, he does so subject to the right of the public to regulate his actions. The will of the people in this as in other respects is expressed through the acts of their representatives in the legislature. The opinion that the reasonableness of the act of the legislature is a judicial question, substitutes the will of the judges for the will of the people. Mr. Justice Bradley clearly foresaw this, and deeply regretted the inevitable conflict between the courts and the legislature.

The Commerce Clause.

Outside the interpretation of the amendments, the most important work of the Court during the late Justice's term was the development of the law relating to interstate commerce. No other Justice, except Mr. Justice Miller, has played such an important part in the development of this, perhaps the most complicated branch of constitutional law, and the one on whose proper application rests the future industrial prosperity of the country. Mr. Justice Bradley and his associates found the law relative to interstate commerce involved in doubt. To-day, as a result of their labors, many principles which can be applied to the majority of new cases as they arise have been firmly established. With the most important and far-reaching of these the name of Mr. Justice Bradley, together with that of Mr. Justice Field, will always be indissolubly connected. The question of the nature of the power of Congress over commerce had often engrossed the attention of the Court. Some judges thought the power was concurrent in the States, others exclusive in Congress. The members of the Court, during the time of Chief Justice Taney, seemed to labor between two difficulties. If the States had a concurrent power over commerce, there appeared to be no limit to the extent of the possible interference of State legislatures in the intercourse between citizens of different States. The main purpose of the "more perfect union" was to prevent this interference. On the other hand, if the power was not exclusively in Congress, were not the State pilot laws unconstitutional?

Mr. Justice Curtis apparently solved this difficulty in *Cooley v. Port Wardens*, when he pointed out that the nature of a Federal power depended upon the subjects over which it was exercised; and, therefore, as commerce embraced a multitude of subjects, it was evident that over some, as pilots, the concurrent power of the State extended, while others, as imports in the hands of the importer, were exclusively under the control of the Federal Government. During the time of Justices Miller, Field and Bradley, a complete change has taken place in the attitude of the Court, and an important rule, first emphasized by Chief Justice Marshall in *Gibbons v. Ogden*, has been firmly established. Chief Justice Marshall had said: . . . "All experience shows that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers, but this does not prove that the powers themselves are identical."¹ This means that a State, in the exercise of her reserved powers, can pass many laws, such as pilot laws, which it would be competent for Congress to pass in the exercise of the power over commerce. The fact that the power may be exclusively in Congress, does not prevent the State from making a law whose purpose, as disclosed by its terms, is fairly intended to improve the internal commerce of the State, or to protect the health and morals of the people, from being a constitutional law, though Congress might have passed a similar law in the exercise of one of her exclusive powers. As far as interstate commerce is concerned, the adoption of this principle ends the confusion which arose from discussing a concurrent power of the State over a subject which, as interstate and foreign commerce, is essentially national. One cannot but believe that its recognition is a distinct advance in our constitutional law. For, from the standpoint of political science, one of the purposes of that law is to separate things national from things local. In the complete development of constitutional law, therefore, there can be no such thing as a subject which is at once partly national and partly local. Natural-

¹9 Wh., 204.

ization, for instance, ought to be a national matter or a local or State matter. To declare that it is both would be to invite confusion. The realization that interstate commerce, as such, is solely a national matter, but that nevertheless there is nothing to prevent the States, in the exercise of their reserved powers, from passing laws which Congress might pass in the exercise of its exclusive power over such a commerce, which is mainly due to Mr. Justice Field and the late Justices Miller and Bradley, has, therefore, done much to clarify our ideas on constitutional subjects.

An important adjunct to the above-mentioned theory, in regard to the consequences of an exclusive power in the Federal Government, is the doctrine which was developed simultaneously with it, and known as that of the "silence of Congress." When the Court regarded the exclusive power of Congress over commerce as not preventing the States, in the absence of conflicting congressional legislation, from affecting commerce in the exercise of their police powers, it immediately followed that any law of the State, no matter how much it obstructed interstate commerce, such as a bridge over an important river, was entirely within the power of a State to enact, provided its main object was one which it was competent for a State to undertake. Such a result was to be profoundly deplored. Justices Field and Bradley, in a long line of cases, commencing with *Welton v. State of Missouri*,¹ took the old distinction between things over which Congress was supposed to have an exclusive control, and those over which the States were supposed to have a concurrent power, and formulated and applied the now famous constitutional doctrine, that the silence of Congress respecting regulations of subjects in their nature national must be taken by the courts as an indication of its will that commerce in this respect should be free from State regulations; but over certain other subjects, such as pilots, over which it used to be contended that the concurrent power of the States extended, then the non action or silence of Congress is no indication of its will that commerce in this respect should be free from

¹ 91 U. S., 275.

State regulations, and, therefore, State laws which affect these subjects do not conflict with the will of Congress. Thus, though the way of regarding the power of the States in respect to commerce was modified, hardly a case had to be overruled.

The practical effect of this interpretation of the commerce clause of the Constitution is a masterpiece of judicial legislation. It requires that the consent of the Federal authority should first be obtained before a particular locality essays to embark on legislation, which, however necessary to preserve the morals of the citizens, profoundly affects the commerce of the whole country. But when once the whole nation decides that such local legislation may, in some instances, be desirable, the particular regulations are enacted by the States, which alone are familiar with local conditions.

This examination of the opinions of the late Justice might be continued indefinitely. We cannot dignify a sketch which has simply touched the outskirts of his work with the name *review*. When we look over the long line of decisions with which his name is connected, a feeling akin to awe and reverence comes over us. Of awe, at the magnitude of the work ; of reverence, at the greatness of the intellect which solved such a variety of problems. Surely, the late Justice was one of those men of whom we, as Americans, can be justly proud. He combined in his own person and character the two strong points of the Anglo-Saxon : a great and wide practical knowledge of men and things, combined with the power of concentration and subjective analysis. At his death, the bench, bar and country lost one who, for the clearness of his thought and for the thoroughness of his acquaintance with all subjects connected with his profession, was perhaps without a superior in the history of our judiciary.

NOTICE.

Book Reviews, omitted from this number on account of lack of space, will appear in the May issue.

ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions.

BY
WILLIAM WHARTON SMITH,
HENRY N. SMALTZ,

HORACE L. CHEYNEY,
FRANCIS COPE HARTSHORNE,
JOHN A. MCCARTHY.

CARRIERS—SUFFICIENCY OF CAR.—A shipper of live stock is not stopped from setting up the defect of a railroad car by which his stock is injured, by a stipulation of the contract for carriage that he had examined the car provided for transportation of the stock and found it in good order and accepted it as suitable and sufficient for the purpose: *Louisville and Nashville Railway Co. v. Dies*, Supreme Court of Tennessee, January 30, 1892, Lurton, J. (18 S. W. Rep., 266).—*H. L. C.*

CONFLICT OF LAWS—STATUTE OF FRAUDS—LEX FORI.—Defendant made a parol agreement with plaintiff to lease him certain land situate in the State of Illinois, and on defendant's refusal to hold to the lease, plaintiff sued to recover damages for the breach of the contract, bringing the suit in the State of Indiana. The lease was within the Statute of Frauds of Illinois, but not within the statute of Indiana. Held: That the Statute of Frauds of Illinois was a matter of remedy incorporated into the contract as affecting its nature and obligatory character, and as the action would not lie in Illinois, it would not lie in Indiana: *Cochran v. Ward*, Appellate Court of Indiana, January 19, 1892, Crumpacker, J. (29 Northeast. Rep., 795).—*W. W. S.*

DISCRIMINATION BETWEEN A RESIDENT AND NON-RESIDENT—CONSTITUTIONAL LAW—FISHERIES—PLANTING AND GATHERING OYSTERS BY A NON-RESIDENT.—A statute of New York made it a misdemeanor for a non-resident of the State to plant or gather oysters in the waters of the State under certain conditions. Held: That the discrimination between residents and non-residents of the State was not unconstitutional, as it was a legitimate exercise of the power of the legislature over the common property of the citizens of the State: *People v. Lowndes*, Court of Appeals of New York, January 20, 1892, Bradley, J. (29 Northeast. Rep., 751).—*W. W. S.*

CONSTITUTIONAL LAW—EMINENT DOMAIN—EXERCISE OF POWER BY UNITED STATES—COMPENSATION.—Lands necessary for the improvement of a harbor cannot be acquired by the United States under the power of eminent domain, where the Act of Congress authorizing the improvements provides that the title to the lands acquired for such purpose shall be vested in the United States without charge to the latter: *In re Montgomery*, District Court of the United States, District of New Jersey, January 19, 1892, Green, J. (48 Fed. Rep., 896).—*H. L. C.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—TAXATION OF TRADES.—A statute of North Carolina provided that those engaged in buying and selling certain goods should pay, in addition to an *ad valorem*

tax on their stock, a license tax on the total amount of their purchases in and out of the State. Held: That this statute, although imposing a tax on articles purchased outside of the State, was not a regulation of interstate commerce, because the license was to carry on a business strictly intra-state, and therefore the tax was not repugnant to the Constitution of the United States: *State v. French*, Supreme Court of North Carolina, February 16, 1892, Clark, J. (29 Northeast. Rep., 383).—*W. W. S.*

CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURTS OF THE UNITED STATES.—The Constitution of the State of Nebraska provided that any one to hold office in the State must have been for two years previous to his election a citizen of the United States. The Supreme Court of the State held that one Boyd, who had received the highest number of votes for the office of Governor, had not been a citizen of the United States for two years previous to his election. Held: That the Supreme Court of the United States had a right to review the action of the State Court, for that Court's conclusion involved the denial of a right or privilege under the Constitution and laws of the United States: *Boyd v. Thayer*, February 1, 1892, Chief Justice Fuller (143 U. S., 135), Field dist.—*W. D. L.*

CONSTITUTIONAL LAW—POWER OF CONGRESS TO PROHIBIT THE USE OF THE MAILS TO DISTRIBUTE LOTTERY CIRCULARS.—The power to regulate the mails of the United States is completely and exclusively vested in Congress, that body having the absolute discretion to say what things shall or shall not be carried by the mail, and therefore the Act of Congress making it a misdemeanor, punishable with fine and imprisonment, to send advertisements of lotteries through the mails, is constitutional: *In re Rapiet*, February 1, 1892, Chief Justice Fuller (143 U. S., 110).—*W. D. L.*

CONTRACT, DAMAGES FOR BREACH OF—RECOVERY OF COST OF ADVERTISING TO COUNTERACT EFFECT OF BREACH—REDUCTION OF PRICE—MEASURE OF DAMAGE.—A contract entered into between two persons provided that one of them should not sell a proprietary article within a certain district. In violation of this contract the prohibited party afterward made sales of the article within the specified territory. It was held that the amount spent in advertising to counteract the effect of the violation of the contract could not be recovered as damages. The proper remedy was an injunction to prevent its sale in the first instance. Nor could any recovery be had upon a bill for injunction and account of the damage suffered by a reduction in price of the article to meet a cut in price on the part of the party violating the contract; all that could be recovered was the defendant's profits: *Fowle v. Parke*, Circuit Court of the United States, Southern District of Ohio, January 22, 1892, Sage, J. (48 Fed. Rep., 789).—*H. L. C.*

CONTRACTS—PUBLIC POLICY—RESTRAINT OF TRADE.—Certain stenographers of Cook County formed an association, one of the purposes of which was to establish and maintain uniform rates of charges by restraining all competition between the members. Held: That the asso-

ciation was illegal as in restraint of trade and against public policy, and that one member could not maintain an action against another member for damage resulting from the underbidding of the former by the latter, in violation of the rules of the association: *More v. Bennett*, Supreme Court of Illinois, January 18, 1892, Bailey, J. (29 Northeast. Rep., 888).—*W. W. S.*

CRIMINAL LAW—CONDUCT OF ACCUSED AS EVIDENCE—WITNESS—DEFENDANT AS—CREDIBILITY OF.—Defendant in a murder trial testified on his own behalf. The trial judge instructed the jury that in determining the credibility of the defendant as a witness, they had a right to take into consideration the demeanor and conduct of the defendant during the trial. Held: That this instruction was erroneous: *Purdy v. People*, Supreme Court of Illinois, January 18, 1892, Baker, J. (29 Northeast. Rep., 700).—*W. W. S.*

EVIDENCE—PRIVILEGED COMMUNICATIONS.—A prisoner, charged with assault and battery with intent to commit rape, wrote a criminatory letter to his wife, which he gave unsealed to one of his daughters to hand to her. Before delivery it was taken from that daughter's pocket by another daughter, and offered in evidence at the trial by the prosecution. Upon exceptions to the decision of the trial judge admitting the evidence, held, that the evidence was competent, coming into the hands of the prosecution as it did, although the letter would have been a privileged communication in the hands of the wife or of the daughter to whom it was given. The Court can take no notice of the manner in which papers offered in evidence were obtained: *State v. Mathers*, Supreme Court of Vermont, January 8, 1892, Rowell, J. (23 Atl. Rep., 590).—*H. N. S.*

EVIDENCE—PRIVILEGED COMMUNICATIONS.—The doctrine of privileged communications between counsel and client does not apply to a solicitor of patents, who is not an attorney at law: *Brunger v. Smith*, Circuit Court of the United States, District of Massachusetts, January 16, 1892, Colt, J. (49 Fed. Rep., 124).—*H. L. C.*

INSURANCE, POLICY OF—MORTGAGE—ARBITRATION.—A policy of insurance containing a provision that in case of loss, upon request of either party, the loss should be ascertained by arbitration, which should be a condition precedent to the right to sue for the loss, was, by request of the assured, made payable to a mortgagee by a memorandum indorsed thereon by an agent of the company. Held: That the mortgagee was bound by the provision in reference to arbitration by his acceptance of the policy, but that he was not bound by the result of an arbitration entered into between the insured and insurer: *Bergman v. Commercial Union Assurance Company*, Court of Appeals of Kentucky, January 21, 1892, Bennett, J. (18 Southwest Rep., 122).—*H. L. C.*

LEGISLATURE, POWER OF—GIFT OF PUBLIC MONEY.—Article four of the Constitution of California provides that the legislature shall have no power to make any gift of public money. An appropriation, therefore, to an individual in payment of a claim for damages for which the State was not liable either at law or otherwise, was invalid because a gift within the meaning of the Constitution. The doctrine of *Respondeat*

Superior does not apply as between the sovereign and a subject employed to carry out a public work or office: *Bourn v. Hart*, Supreme Court of California, February 9, 1892, De Haven, J. (28 Pacific Rep., 951).—*J. A. McC.*

MALICIOUS PROSECUTION—PROBABLE CAUSE—INSTRUCTIONS.—In an action for malicious prosecution, the defendant having caused the arrest of the plaintiff upon a criminal charge, it was held to be error for the trial judge to leave the question of reasonable and probable cause to the jury. The question as to what constitutes reasonable and probable cause is a pure question of law to be decided by the Court after the controverted facts upon which that decision is based, have been found by the jury. Neither is it competent for the Court to give to the jury a definition of probable cause, and instruct them to find for or against the plaintiff, according as they may determine, whether the facts are within or without the definition. Such an instruction is only to leave to them in another form, the function of determining whether there was probable cause: *Ball v. Rawles*, Supreme Court of California, February 4, 1892, Harrison, J. (28 Pacific Rep., 937).—*J. A. McC.*

NEW TRIAL—COMMENT BY NEWSPAPER DURING PROGRESS OF TRIAL.—A new trial was granted, where, during the progress of a trial, which extended over several days, statements which were highly prejudicial to one of the parties and calculated to mislead the jury and prevent them from rendering an impartial verdict, appeared from time to time in newspapers of large circulation and influence at the place of trial: *Meyer v. Cadwalader*, Circuit Court of the United States, Eastern District of Pennsylvania, December 8, 1891, Acheson, J. (49 Fed. Rep., 32).—*H. L. C.*

NUNCUPATIVE WILL—REQUISITES AND VALIDITY.—Six days before his death, the testator, in the presence of his wife and children, declared that he was about to make his will by word of mouth; that he desired them to witness that he left everything to his wife. Immediately before he had written the word "nuncupative" on a paper and had added the words "by word of mouth," in order to explain the meaning of the word to a very deaf son. After his death this paper was found in his desk and read: "Nuncupative by word of mouth my will was made on the above date, everything left to my dear wife, Mary W. Fouche, all my real and personal estate and everything I own at the time of my death, William W. Fouche." This was offered as a will of decedent, but probate was refused on the ground that it was not a valid testament. Held: That it was valid, though written in past tense and called "nuncupative" by testator, and though it was not signed below figures which formed no part of the will: *In re Fouche's Estate*, Atkinson's Appeal, Supreme Court of Pennsylvania, February 8, 1892, *Curiam* (23 Atl. Rep., 547).—*H. N. S.*

PARTNERSHIP—WHAT IS.—Persons who jointly buy land to hold for a rise are not partners, and therefore either party can sue the other for reimbursements of allowances made by him on joint account, without there first being a final settlement and striking off a balance: *Clarke v. Lidway*, Mr. Justice Blatchford, January 26, 1892 (142 W. S., 682).—*W. D. L.*

PRACTICE—AMOUNT INVOLVED TO PERMIT AN APPEAL TO THE SUPREME COURT—RAILROAD MORTGAGE—WHAT INCLUDED UNDER.—Where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, though separate decrees have been given in favor of each plaintiff, the Supreme Court of the United States has jurisdiction as to all such plaintiffs, though the individual claims of none of the plaintiffs exceed the limit prescribed for an appeal. A railroad mortgage concerning the roadbed and "also all other property real and personal of every kind and description whatsoever and wherever situated, etc., . . . now owned or which shall hereafter be acquired and which shall be appurtenant to or necessary or used for the operation of said road," does not cover land granted by Congress to aid in the construction of the railroad: *New Orleans Pacific Railway v. Parker*, February, 1892, Mr. Justice Brown (143 U. S., 42).—*W. D. L.*

PRACTICE—REMOVAL OF CASE TO FEDERAL COURTS—NO NECESSARY STAY OF PROCEEDINGS UNTIL PAYMENT OF COSTS IN STATE COURTS.—Before a trial in the State Court the defendant petitioned for removal of the case to the Federal Courts. The petition was denied, and on verdict for the plaintiff the defendant took the case through all the courts of the State, and finally appealed to the Supreme Court of the United States, where the judgment in favor of the plaintiff was reversed on the ground that the petition for removal to the Federal Courts should have been complied with. The State Court in consequence taxed the plaintiff over \$1,000 costs, and entered a judgment in favor of the defendant for this sum. A transcript having been filed in the Circuit Court of the United States, and the case coming on for trial, the defendant moved for a stay of proceedings until costs in the State Courts were paid. The Court ordered a stay only until the costs (\$108.34) in the Supreme Court of the United States were paid. Held: That it was competent in the Circuit Court to exercise its sound discretion to refuse the stay asked for by the defendant. Judgment in favor of defendant affirmed: *National Steamship Co. v. Tugman*, February 1, 1892, Mr. Justice Brown (143 U. S., 29).—*W. D. L.*

RAILROAD COMPANIES—RESPONSIBILITY FOR STATEMENTS OF EMPLOYEES CONCERNING REGULATIONS OF THE ROAD.—A conductor stated to a passenger when he punched his ticket that he had a right to stop over at a certain station. The passenger in consequence stopped over, but, on boarding another train and offering his ticket, was told that the rules of the company did not permit him to stop over on that ticket, and that he must pay his fare in cash. On his refusal he was ejected from the train. In an action against the railroad company, held, under the above state of facts, that the company being responsible for the statements of regulations concerning tickets made by the conductor on the first train, that the plaintiff was rightfully on the second train at the time of his expulsion, and that the company was liable for the act of its conductor in ejecting the plaintiff: *Erie Railroad Co. v. Winter*, February 1, 1892, Mr. Justice Lamar (143 U. S., 60).—*W. D. L.*

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THE RAILROAD LEASES TO CONTROL THE
ANTHRACITE COAL TRADE.

ARE THEY VOID UNDER THE CONSTITUTION OF
PENNSYLVANIA?

BY SYDNEY G. FISHER, Esq.

The Constitution of Pennsylvania forbids parallel or competing lines of railroad to lease or in any way control each other. This provision is found in the constitutions or codes of many of the States. It was adopted as the result of long and bitter experience, and is generally regarded as a valuable safeguard for the people against the greed and power of corporations.

It was based on two ideas or propositions: First, that it is a good thing for railroads to compete, because competition makes low rates, and that is a benefit to the people. Secondly, that it is a good thing to prevent railroads from consolidating, because when consolidated they become more powerful than the government, corrupt the government, and endanger the liberties of the people.

Two suits have been thus far instituted to annul the Reading leases and agreements with the Lehigh Valley and the Jersey Central: one by Mathias H. Arnot, a citizen

who considers himself injured, and the other by the Attorney-General for the Commonwealth of Pennsylvania. From the bills and answers filed in these cases we gather the principal facts.

The anthracite coal region of Pennsylvania is a district of about 470 or 500 square miles, lying in the counties of Schuylkill, Carbon, Northumberland, Columbia, Luzerne, Lackawanna and Dauphin. This is the only tract of land in the United States where anthracite coal is found.

Before the leases were made, about three-fourths of all the coal taken from this region was carried by three separate and independent railroad systems—the Reading, the Lehigh Valley, and the Jersey Central—which competed with each other, more or less, except where the competition was checked by pools or agreements.

There was first the Reading, whose main line extended from Philadelphia to Mount Carbon, in the anthracite region. The Reading tapped the district on its west side, and shot out from itself numerous branches and leased lines to collect the coal. It carried the coal to tide-water at Philadelphia, where it met with but little competition. It also, by a series of lines which it owned, leased, or with which it had traffic arrangements, carried coal to tide-water at New York, where it endured a sharp competition from the other two roads. It had a satellite known as the Philadelphia and Reading Coal and Iron Company, whose stock it owned, and whose bonds it guaranteed. The satellite owned large tracts of coal lands which it worked by collieries, and sent the coal to market over the tracks of its foster-mother, the Reading Railroad. It was an arrangement to insure profit; for the combination was bound to make something either by mining the coal or by hauling it.

Secondly, there was the Lehigh Valley Railroad. This, like the Reading, was a Pennsylvania corporation, and tapped the anthracite district on the east side. Its main line extended from Easton on the Delaware up the Lehigh Valley to Wilkesbarre. When it reached the coal district it shot out branches and leased lines to gather in the product. A map of these two roads, the Reading and

the Lehigh, shows them approaching the fruitful district, from the southeast, getting into it from different sides, and, as soon as they are in, spreading out like fans or the fingers of a hand until they almost touch, and in one place are closely parallel for twenty-five miles. The Lehigh Valley carried its coal in two main directions—northwest to Buffalo and the Great Lakes, where it did not compete much with the Reading; and eastward by means of lines leased or controlled by it to New York tide-water, where its competition with the Reading was very severe. It was also interested in getting coal to Philadelphia tide-water. But as the Reading had a monopoly there, the competition at that point was slight. The Lehigh, like the Reading, had a satellite, called the Lehigh Valley Coal Company, which owned and leased large tracts of coal lands and shipped the product over the tracks of its foster-mother.

Thirdly, there was the Central Railroad Company of New Jersey. It was a New Jersey corporation, and had a line extending from Phillipsburg on the Delaware, immediately opposite Easton, Pennsylvania, to tide-water at or near New York. It had worked itself into the anthracite region in the manner following:

At Phillipsburg there began a line of railroad, called the Lehigh and Susquehanna, which crossed the Delaware to Easton, Pennsylvania, and extended from there to Union Junction, running parallel with the Lehigh Valley Railroad; and it had branches and leased roads extending into the coal regions. It was owned by another organization, a Pennsylvania corporation, called the Lehigh Coal and Navigation Company. From this company the Jersey Central leased the Lehigh and Susquehanna, and thus entered the coal regions. It also had its satellites; for the Lehigh Coal and Navigation Company, which owned the Lehigh and Susquehanna, owned also large tracts of coal land, and sent the product to market after the manner of a good and worthy satellite. But the Jersey Central was not content with one satellite. It had another, the Lehigh and Wilkesbarre Coal Company, which owned and leased large tracts of coal land and performed all the duties of a satellite.

Such were the three great systems which for many years have transported three-fourths of all the coal that was mined in the anthracite region. On the eleventh and twelfth days of February, 1892, one of these monsters swallowed the other two. It was the Reading whose maw was thus capacious; and it was managed in this wise.

The Reading, first of all, leased the whole Lehigh Valley system and all it contained, branch roads, leased lines, satellites and everything. That was on February 11, 1892. The next day it gathered in the Jersey Central system, but not so directly and easily. It put forward a little satellite called the Port Reading Railroad Company, a New Jersey corporation, which owns a line of road from Bound Brook to Arthur Kill, a tide-water tributary of New York Bay. This Port Reading Company, by a previous understanding with its mother, went and swallowed the Jersey Central system by means of a lease, taking branch roads, leased lines, Lehigh and Susquehanna and everything. Having got the Jersey Central system comfortably within the satellite, the Reading guaranteed the lease and process by which it had been done.

"What was the object of all this?"

"Oh, nothing at all; just to make more money; but not to increase the price of coal."

But what does the Constitution of Pennsylvania say about proceedings of that kind?

"No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in way control, any other railroad or canal corporation owning or having under its control a parallel or competing line."¹

It will be observed that the Constitution says "parallel or competing;" so that competition alone without parallelism comes within the clause. In *Commonwealth v. South Penna. R. R.*,² and *Commonwealth v. Beach Creek*,

¹ Article XVII, Section 4.

² 1 Penna. County Court Rep., 214.

etc., R. R.,¹ it was held that control of any kind, whether direct or indirect, was forbidden. The Court forbade the Pennsylvania Railroad to gain control of the South Penn by making the Pennsylvania Company a cat's paw to acquire the control. It also enjoined the Pennsylvania Railroad from controlling the Beach Creek Railroad by means of the Northern Central. These two cases decided that the courts will look into the real merits of the situation and discover how the control is to be exercised, and that any kind of control, whether direct or through the medium of an agreement or a friendly line, will be prohibited.

Now, the parallelism between the Reading and Lehigh is in one instance supposed to be rather slight. The bills charge a parallelism of about twenty-five miles between Tamanend Junction and Mount Carmel. The answer admits the parallelism, but denies that it involves any competition worth considering. The coal carried from those points by the Reading is taken either northwesterly to Williamsport, or southwesterly to Philadelphia, neither of which points is reached by the Lehigh, whose coal from the neighborhood of Mount Carmel and Tamanend Junction is taken easterly to Penn Haven Junction. The general merchandise carried at these points of parallelism is, the Reading assures us, very insignificant, and not subject to competition by the Lehigh. The merchandise traffic for the year 1891 amounted to only \$1,971.60, and the passenger traffic to only \$6,238.18, making in all \$8,209.78.

The Reading, so far as this actual parallelism is concerned, evidently intends to rely on the doctrine, "*De minimis non curat lex.*" But the question arises, is it a trifle? Twenty-five miles of parallelism is not a small thing. A railroad that long might earn enormous dividends; and some railroads of only half that length near great centres of population are well known to earn enormous dividends. Perhaps the traffic is small now; but it may become very large in the course of the next nine hundred and ninety-nine years, the period of the lease.

Moreover, the present merchandise traffic of \$8,209.78

¹ 1 *Ibid.*, 223.

is not a trifle to the people who live in that neighborhood. And, it may be asked, did not the Constitution intend to protect these few people? It certainly did. It intended to protect everybody; that is its function. It was not adopted by the people for the purpose of protecting the public in a vague, general way, and allowing a few hundred or a few thousand individuals here and there to be crushed. The question is one of civil rights under the organic law of the State; and in such questions, so long as there is any appreciable injury to an individual or individuals, the doctrine of *de minimis* does not apply.

Suppose the answer of the Reading to be true, that although the roads are parallel for that twenty-five miles, yet there has thus far been no competition. Can the Court accept or act upon such a fact? Possibly the roads do not now compete. But if they are parallel, will they not necessarily, or in all human probability, compete within the next thousand years save one? The Constitution forbids parallel roads to lease or control each other, and forbids it in plain language. Is it for the courts to define away that language by saying that just at present the parallelism does not produce competition? The provision of the Constitution was made to protect the people for the future and for all time. Parallel roads were forbidden to lease, because parallelism usually brings competition. If there were only a hundred farmers and trappers within that twenty-five miles of parallelism, they are entitled to the protection of the Constitution; they are entitled to have competition maintained. They are entitled to have it maintained for all time; for within the next thousand years they may grow from a hundred to a hundred thousand, or their farms may be the seat of a great city or of two or three cities.

It is hardly an answer to say that the Court should allow the lease to stand until there is competition, and when, in the future, competition arises, annul the lease. In the same way it might be said that if the competition, having arisen, should in the future cease, the Court should revive the lease; and then, when the competition arose

again, annul the lease again. The Court is not given the power to play fast and loose with a lease—to adjudicate it good, and then with a change of trade, adjudicate it void. The Court is not a railroad administrator, a railroad commissioner or an Interstate Commerce Commission. Is the lease good or bad to-day?—that is the question. The Court is called upon to construe the law and the Constitution; and the Constitution says as plainly as words can say that parallel lines shall not lease or control each other. It is doubtful whether the Court can go further than merely to find whether the lines are parallel. Whether the parallelism at present produces competition or not is hardly the question; for the Constitution says flatly that parallel lines shall not lease.

There is another instance of parallelism which is by no means a trifle. The Lehigh and Susquehanna Railroad is parallel for practically its entire length, a distance of 105 miles, with the Lehigh Valley. Before the leases were made, the Lehigh and Susquehanna, through its owner, the Lehigh Coal and Navigation Company, or through its lessee, the Jersey Central, was an active competitor of the Lehigh Valley, which lies directly alongside of it. By the leases, the Reading has leased the Lehigh Valley on the 11th of February and stepped into its shoes, and the next day it gains control of the Lehigh Valley's competitor and parallel, the Lehigh and Susquehanna. It makes no difference that it accomplishes that control in a roundabout way, by getting the Port Reading Company to lease the Jersey Central, which leases the Lehigh and Susquehanna, and then guaranteeing the contract and lease made by the Port Reading. The Court has already decided in the South Penn and Beach Creek cases that this indirect control is just as bad as a direct lease; and, moreover, the Constitution says that parallel or competing lines shall not purchase, lease or "in any way control" each other.

The matter is, indeed, too clear for argument. There is no question of the close parallelism and close competition; and the Reading, in its answer, shows no signs of making light of the question.

There is another apparent instance of competition which the Reading says is also a trifle that the law will not regard. There is a colliery, called the Mount Carmel Colliery, the property of Mr. T. M. Richter, which is reached by both the Reading and the Lehigh. This man has been apparently enjoying the privilege of having two competing lines by which to ship his coal. He has also apparently made some use of the situation, sending, the answer says, during the year 1891, 36,000 tons by the Reading, and 23,000 tons by the Lehigh—a total of 59,000. This apparent competition is somewhat spoiled by the fact, of which we are assured from reliable sources, that Mr. Richter leases all his coal land from either the Reading or the Lehigh, and ships the coal produced on any part of it over the road of the company that owns it.

The fact that the Reading and Lehigh have owned a large part of the coal they carried, and in the future will own it all, is a troublesome factor in the problem.

The competition and parallelism between the Lehigh Valley and the Lehigh and Susquehanna are clear, and necessarily prohibit the Reading from controlling first one and then the other. The parallelism between the Lehigh Valley and the Reading for the twenty-five miles from Tamanend Junction is also clear. But what shall be said of the parallelism and competition between the Reading and the Lehigh, taking each road as a whole?

This is the most difficult part of the case; and it is impossible to come to any definite opinion about it with the facts at our command. It would require a long investigation and careful examination into the history of the two roads before any intelligent result could be reached.

First, are the roads parallel? In a certain sense, they are. A glance at the map shows that they run in the same general direction, within Pennsylvania, keeping about fifty miles apart. At what distance do roads, parallel in a wide sense, become parallel in a legal sense? The Courts have not decided. But it is not likely that they would declare the Reading and the Lehigh parallel in the sense the Constitution means.

If we may hazard a definition, we might say that railroads are parallel, in the sense intended by the Constitution, when they run side by side and near enough to each other to make it inherently probable that they will, at some time or other, compete for freight or passengers.

The Reading and the Lehigh are hardly near enough to each other to make their parallelism necessarily involve competition. We are, therefore, driven to the other question: Did they, as a matter of fact, compete before the leases were made?

Again, we must ask, what is competition? and again we must hazard a definition.

Railroads compete, in the sense intended by the Constitution, when, if left to themselves, without the interventions of pools, combinations or agreements, they would bid against each other for the same freight or passengers.

Now, there is no question but that the Reading and the Lehigh both drew their anthracite freight from that region of about 500 square miles. Were they bidding against each other for the same freight?

"No," they would answer, "because, with the exception of that colliery of Mr. Righter's, each of us ran to a different set of collieries; and, in many instances, each of us owned the coal we carried."

The reply to this is: Did you not refrain from running to the same collieries because of a private understanding or agreement between yourselves, by which each was to work his own field; and does not this agreement show that naturally there was competition between you?

Was not each one of you prevented from raising rates beyond a certain point by the fear that the understanding would be broken, and your rival would build a line to the colliery against whom you had raised the rates, or that that colliery would build a private line to reach your rival?

If you had fears and agreements of this sort, then there was competition between you.

Moreover, you were owners of coal, as well as carriers of it. Do you mean to say that you did not compete with each other as sellers of this coal? If, although chartered

as a railroad, you, through the formality of another corporation, become a coal miner, is not the Court bound to notice your competition in that respect and discover whether it is included in the intention of the Constitution?

By your leases you have acquired the ownership of the principal part of the anthracite coal of the United States. Most of the remaining part you have bought up by an agreement with the private collieries to take it, at the mouth of the mine, at a fixed percentage of whatever may be the market price. Thus you practically control the price of all the anthracite coal in the United States. There are no more rates on anthracite. You own the anthracite and you carry it. You can call it all rate or all price, just as suits your bookkeeping.

Do you mean to say that, before making this combination, you two were not competitors; and that you did not make this combination to wipe out the inconveniences of competition?

When the Constitution said that competing railroads should not lease or control each other *in any way*, did it mean merely as carriers for others? Did it mean that they could avoid competing as carriers by each one owning the product they carried? Did it mean that after that they could combine, buy up all of a valuable product produced only in Pennsylvania, and say, "We take it to market not as carriers, but as owners?"

The people of Pennsylvania at large, every man and every family that burn coal in winter, can be affected by such a combination. The question resolves itself to this: Has not the Reading, by means of these lines, the power of controlling the price of anthracite? Has it not a power, in this respect, which, before the lease, it had not? If it has such a power, then the lease is that species of control forbidden by the Constitution.

The Constitution aims at power. It aims to cut down power dangerous to the people. It aims to prevent power getting into hands where it may be used against the people. It aims to prevent possibilities and probabilities. It is not enough that the power thus far, up to the time of the

decision of the Court, has not been abused. It may hereafter be abused ; and that is enough.

The Constitution did not intend the courts to be deceived by present appearances or by assertions, or even economical proofs, that, in all probability, the rates would remain the same, or, at the worst, would not be raised extravagantly. If the rates remain the same, the competing roads are still forbidden to control each other, because the control puts it in their power to raise the rates whenever they choose. It is that power over the citizen's pocket which the Constitution was aiming to strike down. It would be very futile and weak for the Court to say, "We will let you lease; but the moment you raise the rate one penny in consequence of the power we have given you, that moment we will take your lease away." The Constitution forbids even the grant of such power. It forbids the courts to give such power. It does not give them leave to give the power and then regulate it afterward.

If the rate is raised only half a penny per ton, the constitutional prohibition applies to that half-penny as much as to a dollar. If you admit the possibility of a rise of half a penny in consequence of the new power given, you admit that you are within the reason and mischief aimed at by the constitutional prohibition.

So far as the law is concerned, the question cannot be placed on the basis of profit-sharing. It may be that, as a matter of political economy, it would be wiser for the people of Pennsylvania to pay twenty-five cents more a ton for anthracite coal and have the Reading a solvent corporation. That is not the question before the Court. The question is, what the Constitution says, what it means, and what are the reasons for that meaning.

This brings us to the broader view of the subject : What was the whole object of the people in adopting that clause of the Constitution? Was it merely to get cheaper rates for themselves—a difference of two cents a mile in hauling passengers or a difference of twenty-five cents a ton in hauling coal? Was it not for a larger purpose? Was it not their method of solving the great question of

the age—the corporation problem? They were liberal to the corporations; they always had been. They recognized in them the great instrument of modern development. But they intended to check their enormous power and the abuse of that power. For that reason they adopted that clause of the Constitution.

What will be the power resulting from the whole anthracite coal trade, formerly in the hands of three, now in the hands of one? Who can estimate it? There must be added also the power which will come from having absorbed both the passenger and the general merchandise traffic of the two competitors.

In its answer filed, the Reading says that it had recently greatly increased its business by connections with the Baltimore and Ohio and the New York Central, so that it became necessary that it should acquire the best and greatest terminal facilities in New York Harbor. This was the more important because by means of the Lehigh Valley it would have a line to the Great Lakes, and thus be enabled to sweep in a vast general trade from the West to the seaboard. This means power, and enormous power.

When the prohibition contained in our Constitution was adopted in 1874, the most active incentive to its adoption was the Pennsylvania Railroad, which had been riding rough-shod over the State, controlling legislatures and city councils. The people had had enough of that master. They were not willing it should be greater; and they intended to prevent, if possible, the creation of another.

Many of the people of Pennsylvania are for the moment filled with the generous hope that the Reading leases will pull through. But if that hope should affect the judgment of the Court, might we not all live to regret it?

The provision of the Constitution is a wise one, and recent events in Philadelphia show it to have been wise. The prohibition of the Constitution against parallel or competing lines of railroads, leasing or controlling each other, does not apply to the street railways of a city.¹ In consequence, we have in Philadelphia an organization

¹ *Gyger v. West Phila. P. R. Co.*, 26 W. N. C., 437.

known as the Traction Company, the product of parallels and competitors swallowed whole. It owns the city, is part of the city government, and is stronger than the city government.

The main point of the corporation problem is that corporations tend to become stronger than the government and stronger than the people. Our people have already one such corporation. Do they want another, which shall be seated in the eastern half of the State, with its rival seated in the western half; and, having made the two, would they like the two to combine into one?

IS THE BOUNTY ON SUGAR CONSTITUTIONAL?

BY WM. DRAPER LEWIS, PH.D.

In the February number of the *Harvard Law Review*, CHARLES F. CHAMBERLAYNE has an article, entitled "The Sugar Bounties."¹ It is a careful and able presentation of the view that the "Sugar Bounty Clause" of the McKinley Tariff Act is unconstitutional.² The ground taken by the author is substantially the same as that taken by the counsel for Sternbach & Co., when the case of that firm against the Government, which was supposed by Mr. Chamberlayne to involve the power of Congress to grant bounties, was before the Court. It is argued that it is against the nature of a free government to grant bounties to private persons for entering or laboring in a private employment.

The case of *Sternbach v. United States* has now been decided by the Court,³ Mr. Justice HARLAN expressly refuses to enter on the question of the constitutionality of a bounty.⁴ It is difficult, nay almost impossible, to imagine a

¹ *Harvard Law Rep.*, Vol. V, p. 320.

² Act of Oct. 1, 1890, C. 1244, Sec. 1, Par. 231, Schedule E.

³ Reported under the name of *Field v. Clark*, 143 U. S., 649.

⁴ Page 695.

case arising, the decision of which would necessarily involve the constitutionality of a bounty given by the Federal Government. But we may be sure that sooner or later a way will be found to legitimately test the correctness of the position assumed by Mr. Chamberlayne. Then, in the words of Mr. Justice HARLAN, "It would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching." To say that the *genius* of the institutions of a free people prevents them stimulating, by bounties, particular industries—something all national governments have done, and something which, perhaps, one-half of our people believe to be the correct economic policy to pursue—is one whose importance demands of every citizen the most careful consideration, and requires us to go into the fundamental principles of constitutional law.

All our governments are created by written constitutions. The people are sovereign, but government with us is the creature of the Constitution. No one has placed the light in which we should regard our constitutions, whether State or National, better than Mr. Justice BREWER. He says: "The object of the constitution of a free government is to grant, not to withdraw, power. The habit of regarding the legislature as *inherently omnipotent*, and looking at what express restrictions the constitution has placed upon its action, is dangerous and tends to error. Rather, regarding, first, those essential truths, those axioms of civil and political liberty upon which all free governments are founded; and, secondly, statements of principles in the Bill of Rights, upon which this governmental structure is reared, we may then properly inquire what powers the words of the constitution—the terms of the grant—convey."¹

All power resides in the people, or, as the political scientists have it, in "the State." Part of this power they

¹ The State *v.* Nemaha Co., 7 Kansas, pp. 554, 555. Diss. opinion of Mr. Justice BREWER. Mr. Justice MILLER, in *Loan Asso. v. Topeka*, 20 Wall., p. 663, says: "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere."

have delegated to the government created by the constitution. To interpret the powers granted we need not go back of the constitution. The numerous dicta which speak of the unwritten constitution back of the written, while they indicate a correct point of view, are unfortunate in the choice of words.¹ What is meant is, that the words of the instrument itself, like the words of any other instrument, should be interpreted in the light of the object which the people had in view when they adopted it. If, in the case of a written constitution, the central object is the establishment of a government of a free people—a republican government—the fundamental principles of a free government, the liberty and equality of the citizens is always the undercurrent of thought, in every line, in every word. It is in the light, therefore, of the fundamental principles of human liberty, that we must interpret every power which has been delegated by the people to the government.

This principle, we all must admit, is as applicable to the Federal as to the State governments. The people of this country never intended to create a despotism. There are individual rights that are beyond the control of the government of the United States. Mr. Justice MILLER has truly said: "A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute despotism

¹ Thus Judge BECK, in his concurring opinion in *Hanson v. Vernon*, 27 Iowa, p. 73, says: "There is, as it were, back of the written constitution, an *unwritten constitution*." Yet, in spite of this unfortunate use of words, we believe the expression indicates a sounder conception than that of Mr. Justice CLIFFORD, in his dissenting opinion, in *Loan Assn. v. Topeka*, 20 Wall., p. 669, where he says: "Courts cannot nullify an Act of the State on the vague ground that they think it opposed to a general latent spirit, supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction." See also the dissent of Judge COLE, in *Hanson v. Vernon*, 27 Iowa, p. 78. No Act of the Legislature can be annulled on vague ground; but the foundation principles of human liberty are not vague, and the structure of all our constitutions shows that the powers granted to government were to be limited by those principles.

and unlimited control of even the most democratic depository of power, is after all but a despotism."¹

There are, therefore, fundamental rights, which we as individuals have in common with other citizens of this free government. Does the Act of Congress, granting a bounty on the production of sugar, trespass on our rights? It is contended that it does, in that it appropriates money for private purposes. If the appropriation of money to pay sugar bounties is the furtherance of a private purpose, and not public, there is no doubt but that the bounty is unconstitutional. For if there is one proposition more fundamental than another, it is that a free government is established for public and not private ends. An Act, whose primary object is to benefit A, B or C, cannot become law. To multiply authority or quotation on this head would be useless.²

The question then is: What is a "public purpose?" The way in which all the cases, which have involved the proper construction of the term, have come before the courts, is where municipalities, under the permission of State legislatures, have subscribed to the stock, or donated money to private companies, or granted money to individuals or firms. In all the cases the courts have universally recognized the fact that an Act, whose primary object was the benefit of A or B or C, is nothing more than an attempt at legislation, futile, because of the want of power granted by the people to the Legislature.

The courts have universally declared that all ordinances of city councils, granting aid to manufacturing companies, or others engaged in private business, are void. Thus,

¹ *Loan Asso. v. Topeka*, 20 Wall, p. 662.

² "To lay with one hand the power of government on the property of the citizen, and with the other to bestow it upon favored individuals, to aid private enterprise, and build up private fortunes, is none the less a robbery, because it is done under the forms of law, called 'taxation.'"

"No government can tax the whole people for the benefit of a single individual or an enumerated class of individuals." "By taxation," says Chief Justice BLACK, of Pennsylvania, "is meant a certain mode of raising revenue for a public purpose, in which the community that pays it has an interest." *Sharpless v. Mayor of Philadelphia*, 21 Pa., p. 174.

when the town of Jay, in Maine, under permission of the legislature, provided that if a certain private company moved its plant from another town in the State to Jay, the town would lend \$10,000 to the company, the Supreme Court of the State held the Ordinance void, as the moving of the company's saw-mill to the town was not, for the inhabitants of Jay, a public purpose.¹ The fact that the town had been authorized to make the loan by the legislature was immaterial; the legislature only being able to grant to the corporation power to pass laws for public purposes pertaining to the town. The fundamental principle of government, that its Acts must be for public purposes and not for private gain, as thus applied to loans to particular companies by municipalities, has been made in every State in the Union, in which the question has arisen, and in the Supreme Court of the United States.² Whether the aid has been attempted through loans or through subscriptions to stock, the purpose, the aid of particular persons, being private, the Acts have been declared void.³

That there may be a public advantage in the prosperity of A, B or C cannot be denied. But, "the promotion of the interests of individuals, either in respect to property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character a private and not a public object. The incidental advantage to the public, or to the State, which results from the promotion of private interests and the prosperity to private enterprise or business, does not justify their aid by the use of public money."⁴ In fact, the conclusion of every court

¹ *Allen v. Town of Jay*, 60 Me., 124.

² *Weismer v. Village of Douglas*, 64 N. Y., 91; *Commercial Bank of Cleveland v. City of Iola*, 2 Dil. C. C. Rep., 353; *McConnell v. Hamm*, 16 Kansas, 226; *Bissell v. City of Kankakee*, 64 Ill., 249; *English v. The People*, 96 Ill., 566; *Cole v. LaGrange*, 113 U. S., 1; *Parkensburg v. Brown*, 106 U. S., 487; *Weeks v. Milwaukee*, 10 Wis., 242; *Ohio Valley Iron Works v. Moundsville*, 11 W. Va., 1.

³ *The C. P. & U. P. P. R. Co. v. Smith*, 23 Kansas, 745. See also *Minn. v. Foley*, 30 Minn., 350.

⁴ Mr. Justice GRAY, in *Lowell City v. Boston*, 111 Mass., p. 461. It is not necessary, however, that the public service should have been requested by the government at the time of their performance (*Freeland*

and constitutional lawyer may be summarized thus: "*Money cannot be paid directly or indirectly by government to the individual, except in payment for public service, or to further some public purpose; and the establishment of A, B or C in business, or helping A, B or C as individuals to do anything or be anything, is not and cannot be a public purpose.*"

Subscriptions to the stock or bonds, and donations to railroad companies by the municipalities through which they pass, have been upheld, wherever declared valid, on the grounds that though managed by private corporations, their duties were essentially of a public nature, and their every act was subject to the control of the State government, not only by general laws, but by specific regulations.¹ "The company may be private," says Chief Justice BLACK, "but the work they are to do is a public duty."² The position taken by those who follow the general trend of authority on this subject is strikingly put by Judge VALENTINE, in the principal Kansas case. He says: "Suppose the State should employ an individual to carry stationery from the depot in North Topeka to the state-house, would the transportation of such property be any the less a public purpose because the person so employed might be a private individual and the wagon and horses with which he might transfer the stationery might be private property? And will it be contended that no taxes could be levied or public funds used to pay for the service of a postmaster and the

v. Hastings, 10 Allen, 570), or that the recipient could have recovered by a suit against the municipal corporation. It is sufficient that a public service has been performed. (*Town of Guilford v. Supervisors of Chenango Co.*, 13 Ill., 143.) See comments of FOLGER, J., on this case, in *Weismer v. Village of Douglass*, 64 N. Y., p. 99. On its correctness rests the constitutionality of all pensions paid to soldiers, or the civil employees of government. See also *Blanding v. Burr*, 13 Cala., 343; *Creighton v. Board of Supervisors*, 42 Cala., 446; *Lurton v. Ashbury*, 41 Cala., 526; but the specific property especially benefited cannot be assessed. See *In the matter of Market St.*, 49 Cala., 546.

¹ For a list of cases up to 1871, in the various State courts, see *Leavenworth Co. v. Miller*, 7 Kas., 503-6, per VALENTINE, J. See also a partial list in *Hanson v. Vernon*, 27 Iowa, p. 81, per COLB, J.

² *Sharpless v. Mayor of Philadelphia*, 21 Pa., p. 170.

use of his house and furniture, or to pay for the service of said individual, and for the use of his horse and wagon, simply because the post-office and furniture and horse and wagon are private property?"¹

This seems to be a complete answer to the argument advanced by Judge DILLON² and by Mr. Justice BREWER,³ and adopted in the Supreme Courts of Iowa,⁴ Michigan⁵ and Wisconsin,⁶ that these Acts aiding railroads, because they appropriate money to private individuals, are unconstitutional. Granting the business of a railroad to be a public purpose, the fact that the State hires private individuals to perform this end is no reason why they should not be paid by the State. Those who support the validity of these donations to railroads cannot but regard a railroad company very much in the light of the clerk of a court, who is paid for the services he renders the public partly by the fees of suitors. The fact that he has the right to certain stated fees does not deprive the State of the right to grant him sums in further payment.

The great difficulty with this view, as applied to railroads, and the reason why such differences of opinion have been held by eminent jurists, lies in the fact that the relation of the State to railroad corporations has never been clearly set forth. It is manifest that if a corporation con-

¹ *Leavenworth Co. v. Miller*, per VALENTINE, J., 7 Kas., p. 526.

² In *Hanson v. Vernon*, 27 Iowa, 28, 53.

³ Dissent in *State v. Nemaha Co.*, 7 Kas., p. 563.

⁴ *Hanson v. Vernon*, 27 Iowa, 28.

⁵ *People v. The Township Board of Salem*. This case over-ruled *Swair v. Williams*, 2 Mich., 427; 20 Mich., 452.

⁶ *Whitings v. Fond du Lac R. R. Co.*, 20 Wis., 167. The Supreme Court of the United States refused to follow this construction of the Constitution of Wisconsin, because it was based on general principles of constitutional law and not on the words of the State Constitution (*Olcott v. The Supervisors*, 16 Wall, 678, and *Rogers v. Burlington*, 3 Wall, 654, the Chief Justice, FIELD, MILLER and GRIER, J.J., dissenting); thus following their own opinion and decision that loans by municipalities to railroads are not loans for a private purpose (*R. R. Co. v. Otoe*, 16 Wall, 675, the Chief Justice, MILLER and DAVIS, J.J., dissenting). See also *St. Joseph Township v. Rogers*, 16 Wall, p. 644. The Supreme Court also refused to follow the Michigan case, see *Taylor v. Ypsilanti*, 105 U. S., 60 *New Buffalo v. Iron Co.*, *ibid.*, 73. See *Pine Grove v. Talcott*, 19 Wall, 66

tracted to carry the mails of the United States, the amount which it could charge and every detail of management could be directed by Congress. Such a corporation would be as completely the servant of Congress as any other employee of the government. The validity of grants of public money to pay such services would never for a moment be questioned. But under the law, as laid down by the cases, a railroad corporation is not the absolute servant of the State, in the sense that a letter-carrying corporation would be of the United States. A State can make a contract with a railroad corporation which it cannot break.¹ It can regulate the rates of fare,² but this power is no power at all because the regulation must be reasonable.³ The question, therefore, in the case of railroad grants, is whether a State, through a municipality, can grant money to a quasi-servant over the work of which it has but a limited control. This question, depending as it does on the circumstances of each case, will never be finally determined. The great weight of decisions to-day is in favor of the legality of State loans and payments to railroads; but we are willing to admit that the ultimate determination of the question will not be until the courts declare that railroad companies are solely the servants of the State. But whichever way that question is finally determined, it has manifestly nothing to do with the question of the legality of the bounties.⁴ In the railroad

¹ *Ruggles v. Ill.*, 108 U. S., 526.

² *Chicago, Burlington and Quincy R. R. Co. v. Iowa*, 94 U. S., 135.

³ *Chicago, Milwaukee and St. Paul R. R. Co. v. Minn.*, 134 U. S., 418. But this question is again involved in doubt. (See *Budd v. New York*, 143 U. S., 517.)

⁴ Following the principle that a government of a free people can pay out money to a quasi-public servant, the Supreme Court of the United States held that it was within the constitutional power of a State to allow a municipal corporation to donate its bonds to a grist-mill, because all the public had a right to grind flour at such mills (*Township of Burlington v. Beasley*, 94 U. S., 310). Judge PAINE, in his dissent to the principles announced by his Court, in *Curtis Admr. v. Whipple*, 24 Wis., 359, takes the ground that the aid of such things as education is sufficiently a public purpose, to enable the State to make a grant to a definite private school. But the better opinion seems to be that a gift, by government even to a private eleemosynary institution, is only valid where the direction of the charity is under the absolute control of the State, and is open to all the

cases the courts may have gone to the extreme limit in the construction of what is payment to individuals for public service ; but it is evident that the payment of money to anyone who raises sugar is not a payment for a public service, and must be held constitutional, if at all, on lines of

public. (Opinion of Judge DILLON, in *Hanson v. Vernon*, 27 Iowa, 57. See also *The Trustees of Brooks Acad. v. George*, 14 W. Va., 411.) Thus a gift of public moneys to a school building, whose trustees, though selected by the town, were limited to certain religious denominations, has been declared unconstitutional (*Jenkins v. Andover*, 103 Mass., 94). See also *Curtis v. Whipple*, 24 Wis., 350, where the town donating the money had no control over the trustees of the school, who, at their discretion, might have excluded all persons of the town from their school. The principle that the State must have the absolute control over the works of the company, to enable it to donate money toward the work, was applied in *Coates v. Cambell*, 37 Minn., 498. The question for decision was the right of a town, under legislative permission, to give its bonds to a corporation for the purpose of aiding the corporation to erect a dam. The Act was declared unconstitutional, on the ground stated by Chief Justice GILFILLAN, that the "water-power must belong to some private person or corporation, and the public has no more right or interest in it, or right in its use, than in any other power owned by a private person or corporation."

There is one feature of public aid to railroad corporations and similar companies, which one can only wonder was ever permitted, and whose support is rather in the accumulation of authorities than in the accumulation of reasons. Whenever municipal aid to railroads has been permitted at all, towns have been allowed to lend their aid by subscribing to the stock of the corporation. (See, for principal case, *Sharpless v. The Mayor of Philadelphia*, 21 Pa., 147.) Permitting a municipal corporation to pay for cleaning a street, or loan money to a company who would undertake to clean the streets, is one thing. It is paying in one form or another for public work ; but taking stock and becoming a member of a private corporation, with all the liabilities of a stockholder, is a totally different thing. It is becoming a partner in a business whose object is the making of money. Judge REDFIELD, in the 12th Am. Law Reg. (N. S.), 500, while he admits the propriety of a municipality taxing itself to aid in the construction of a railroad, says : " But the attempt to do this by allowing the municipalities to become members of these private companies, must surely be an anomaly." Whatever may be a public purpose for a municipality, partnership in private corporations is not included in the list. And yet it was held, in *Sweet v. Hubert*, 15 Bart. (N. Y.), 312, that while under the decision of the Court of Appeals, in *Bank of Rome v. Village of Rome*, 18 N. Y., 38, the legislature could authorize a town to subscribe to the stock of a railroad, it could not authorize a town to donate money to a railroad. This, as it seems to us, was a complete reversal of legal principles.

reasoning totally distinct from those which uphold such payments.

It may be perfectly true that a gift of money to A or B or C is not a public purpose, and that the payment of money to an individual or corporation for public services is a public purpose. But when we have said this much we have not said that the only public purpose conceivable is the payment of money for public services.

Now, it may be conceded that a law, to be a law at all, must be, theoretically at least, for the equal benefit of the *whole* people. A law which taxed the inhabitants of one county to pay the debt of a whole State would be unconstitutional, because for the special benefit of the rest of the counties.¹ Just as an attempt of the legislature to raise the public funds from a single individual would be legislative robbery.² We see the recognition of this rule in the opinion, which is frequently advanced, that a municipality cannot invest in a railroad corporation, because a railroad benefiting other portions of the State besides the city, the city cannot lend its aid to its support.³ And, in fact, such legislation can only be supported on the ground that the town has a special interest in the railroad passing through it;⁴ just as it has a special interest in and can therefore donate money to a school house erected in its limits, though all the people in the State may theoretically have a right to attend it.⁵

¹ *Sharpless v. Mayor of Philadelphia*, C. J. BLACK, 21 Pa., 168.

² *Ibid.*

³ BECK, J., in *Hanson v. Vernon*, 27 Iowa, p. 77. Opinion of Mr. Binney on the right of Philadelphia to subscribe for the stock of the Penna. R. R.

⁴ C. J. BLACK, in *Sharpless v. Mayor of Philadelphia*, 21 Pa., 121. Though one cannot but think that, however sound the principle, the learned Chief Justice expanded its application to its full extent when he sustained the Ordinances of the Councils of Philadelphia, authorizing the Mayor to subscribe for the stock of the Hempfield road, whose eastern terminus was 346 miles west of Philadelphia, simply because the road formed a link in the system of roads leading to the city.

⁵ *Merrick v. Amherst*, 12 Allen, 501. (See also *Dorgan v. City of Boston*, 12 Allen, 223.) For the application of the principle that the special interest in a locality in a general public object is sufficient to enable it to carry out that object, see *Barrett v. Brooks*, 21 Iowa, 144; *Bell v. Foutch*, 21 Iowa, 119, where the right of a county to build highways and bridges, to be used by all the people in the State, is sustained.

though the people of a town or county cannot be through their State or municipal government, to support an Act which is practically as beneficial to persons outside as to themselves, there is no reason the people in the State should not contribute to a which is especially beneficial to a particular locality. Any, no act of government is equally beneficial to member of the State. To declare that "practical of benefits was the test of public purpose" would lead to all legislation. No law was ever intended to be and universally beneficial.¹ The improvement of the making of a park—is more beneficial to those in close proximity, than to those who live far off, might add, the benefit to those who do not use the of the most infinitesimal and remote kind. Laws of relief to the poor are only of advantage to those poor. Laws relative to those who own real estate man to own real estate before he can be benefited

then, therefore, we say that a law must not be for the a class, or an individual, but for the whole people, uttered a fundamental principle of free government simply a meaningless phrase? I believe we have truth—one that has a very definite and positive but not an impossible meaning. It denotes that *the criteria of a law being for a public purpose is any person under the government be allowed, if he its conditions, to partake of its benefits.*³ An Act erected a school-house in the town of X, and, withholding schools anywhere else in the State, prohibited the children of the inhabitants from attending the

is admitted by Mr. Chamberlayne, p. 324. See also opinion of A. J., in *Norris v. City of Waco*, 67 Tex., p. 642.

Erron, J., in *Allen v. Inhabitants of Jay*, 60 Me., 140, says: "But a public use . . . it is not essential that all portions of the should derive equal benefits from the purpose for which taken. It may be taken, though only portions of the community thereby benefited."

It will be doubted whether the distribution of an equal amount to every person is a public purpose. See *Hooper v. Emery*,

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school, might well be said to be unconstitutional; but Acts which provide for the erection of a college at the State capital, though undoubtedly more beneficial to the inhabitants of the capital than to those who live in the remote parts of the State, are hailed as a wise expenditure of public money for a beneficial public purpose.

The conditions which must be fulfilled before the benefits of an Act can be enjoyed by an individual, however, must have some relation to the general public purpose of the Act. To spend public money to pave a highway is constitutional, though, practically, only ten persons in the State used the same, but no one would defend an Act to restrict the highway to people having one hundred dollars apiece. On the other hand, to confine its use to wagons would be within the powers of government, because the condition has some relation to the end in view—the proper use of the highway. All people who fulfilled the condition of having wagons could use the highway.

To carry on our investigations a step further: The grant of a sum of money to B, he being very poor, would be unquestionably bad. The general purpose of equalizing the conditions of life may be a public purpose, but the raising of B, as B, from poverty, is not a public purpose. Nevertheless, an Act by which the same individual, B, received the same amount of money, would be constitutional, provided that all poor and destitute persons could receive a like sum. The law would be a general law, equally applicable to all citizens who fulfilled the conditions of being destitute, and B had fulfilled that condition. The point which we learn from this example is this: That such an object as the relief of the destitute, being a public purpose, it could be carried out by paying public money to A, B and C, provided such payments were made under a general law, equally applicable to those who fulfilled its conditions. From this we draw four conclusions:

First.—That because A or B or C is destitute, his raising from distress is not such a public purpose as will support a direct grant of money for his sole and exclusive benefit.

d.—That the relief of the poor is a public purpose, therefore, laws dealing with the poor in general, of certain kinds, are laws for a public purpose.

—That it does not interfere with the constitution of the laws that they are practically carried into effect by paying money to A, B or C.

h.—That one who desires to prove that sugar bounty is unconstitutional must either prove one of two things: (1) That the stimulation of a particular industry by the Federal Government is not a public purpose; or (2) that if it is a public purpose, it is one of such a different nature from the relief of the destitute, that there is an innate reason why it cannot be carried out by any other means, which practically results, as laws for the relief of the poor, by paying money to A, B or C.

To discuss the last question first: There are three cases, *Well v. Boston*,¹ *Fieldman & Co. v. City of Boston*,² and *the State v. Osawkee Township*,³ in which the courts have drawn a distinction between the public purpose of charity and all other public purposes. The first case arose out of the great fires in Boston and Charlestown. The city councils in both passed ordinances authorizing the cities' money to any person whose house was destroyed and who desired to rebuild. The Acts were held unconstitutional. Without an intimate knowledge of the facts no one would care to criticise the decisions. Everyone must admit that some laws, which on their face pretend to be applicable to all persons in certain circumstances, might narrow the conditions to such an extent as to amount to private legislation. To put an example: Suppose the law-making body should pass a law providing that all persons who had been hurt by the great fire which took place on June 1 should have their buildings rebuilt at the expense of the public, and it was known that such and such was the only building destroyed on that day. No one could defend the constitutionality of such an Act.

¹ 545.

² 23 S. C., 57.

³ 14 Kas., 418.

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In the Kansas case Mr. Justice BREWER declared unconstitutional a law of that State which provided that all persons who were unable to buy seeds for planting, on account of a recent failure of crops, could obtain seeds on application to the authorities. The reasoning by which the conclusions were reached in all these cases, however, would apply not only to all laws of a similar kind, but to all laws which attempted to help the persons injured by any disaster, however frightful, which did not leave them absolutely destitute. The reasons advanced seem (except in one instance) to have been put forward without consideration of the point that all persons fulfilling the conditions of the law could receive its benefit, and the fact that even in a charity an Act appropriating money to specific individuals would be invalid. The exception is Mr. Justice GRAY. Speaking of the Boston ordinance, he says: "The general result may indeed be thus stated collectively, as a single object of attainment; but the fund raised is intended to be appropriately distributed, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business."¹ Such a method of dividing up legislation would be fatal to all laws. A public park is used by A. If we do not consider the whole purpose of the park, and simply consider his use of it, the Act establishing the park and laying out the grounds becomes a private Act for the benefit of A. If the feature of paying public money to the individual condemns the Act, then all relief of the destitute by the State becomes unconstitutional. Applying the principles recognized in charities to other cases, and we can say, that the general purpose of a law being a *public purpose* for the people, whose government passed the law, and if every citizen who will fulfil its conditions has an equal right to its benefit, the law is not unconstitutional, because it results in paying money to the individual. We fail to see that there is any logical difference between the public purpose of

¹ Lowell v. City of Boston, 111 Mass., 472.

and any other public purpose. And we cannot make that empirical distinctions, not based on real facts, make generally bad and always uncertain principles of law.¹

The bounty now given on sugar by the Federal Government is paid to individuals; but it is not paid to certain individuals or to a class, but to all persons in the States who will grow sugar. It does not discriminate between the different parts of the United States. If I want to raise sugar under glass in Montana I will receive the bounty. If, therefore, it is a public purpose for the United States Government to increase the amount of production in a particular industry, this law cannot be said to be more than constitutional.

Justice BREWER's opinion, in the State *v. Osabekee*, sustains the proposition that no government of the people has any interest in its industries to enable it to regulate a particular industry. The learned Justice is cold and harsh as the statement may seem, it is nevertheless true that the obligation of the State to help is only to those who are unable to help themselves."² . . . Finally, the position of Mr. Justice BREWER is that the government has any interest in the industries of the country.

Economically this may be a true theory, and the country may, in the long run, be happier if the State and national governments raise not so much as a little to stimulate industries, or turn industries from one to another. According to the Manchester school of economics, this is the best plan for government to follow. But it is extraordinary to say that a government of the United States has *no interest* in its industries. Politicians may advocate a passive policy by a State in respect

to industries. It has been held that a State can grant a bounty to all who produce sugar in the State. See *People v. State Auditor*, 9 Mich., 327; *Law Mfg. Co. v. City of East Saginaw*, 19 Mich., 259. Though the State Court which pronounced these decisions has since repudiated them, no doubt on them, modifies their importance. See *People v. Board of Salem*, *supra*.

See also the clear and forcible statement of his opinion of paternal government in his dissent in *Budd v. New York*, 143 U. S., p. 443.

HARVARD LAW LIBRARY

to its industries; but we do so, not because government has no interest in the industries of the country, but because we believe it is best for the industries to leave them alone.

It is a common error with our lawyers—but none the less an error because of its being common—to fasten unconsciously their economic ideas on our constitution. This is but natural when we consider how firmly imbedded were certain economic and social theories concerning the advisability of the non-interference of government in industrial progress. The proposition that government could, by statutory law, aid industry and help to develop the country is, to many, almost inconceivable.¹

But, in spite of our political and economic beliefs, the real question narrows itself down to this: The stimulation of a particular industry being conceivably within the powers of a government of a free people, is it within the province of our Federal Government, as constituted under the Constitution?²

The position taken by Mr. Chamberlayne, in this part of his argument, is unconsciously singularly inconsistent with that taken when he speaks of the impossibility of presuming that a free government could pay the public money for a private purpose. He assumes, what we all must grant, that if the power to pay sugar bounties is not found expressly or impliedly in the Constitution, the Federal Government cannot pay such bounties; but, as we have pointed out, all constitutions must be regarded in the light of the subjects with which they deal. We saw that our constitutions established governments of a free people, and

¹ Judge REDFIELD, in 12 Am. Law Reg., 503, and Judge DILLON, in *Hanson v. Vernon*, 27 Iowa, 59. And yet there is no fundamental reason why it should not be for the advantage of the whole people to stimulate a particular industry, or why government violates individual rights in so doing.

² "And in deciding in any given case, whether the object for which taxes are assessed, falls upon one side or the other of the line (public purpose), they (the judges) must be governed mainly by the course and usage of government, the object or purposes which have been considered necessary to the support and for the proper uses of a government, whether State or National or Municipal." Per Mr. Justice MILLER, in *Loan Asso. v. Topeka*, 20 Wall, 664.

once perceived that all their provisions must be read in the light of the fundamental rules of human freedom. The Constitution of the United States established the Government of the "nation" of the United States. We are not only practically a nation, but constitutionally we are a national government.¹ All powers adequate for the conduct of a nation, and the furtherance of national interests, we must presume to have passed by the Constitution to the government of the United States.² Is, then, the Government of the industrial conditions of the country, taken as a whole, a public purpose for a nation? Such a question has only to be asked to be answered in the affirmative. It may well be argued that the fostering of an industry, by a particular town of the State, may not be a public purpose for the government of the town.³ Such a question stands in the place of the State, with part of the territory, and a State could not aid the cotton industries in town B, and not in the town C.⁴ But when we come to the National Government, the industrial welfare of the people is unquestionably a public purpose. Any objection to such a proposition would be absurd. Recognizing this, we must further recognize that government can only aid the interests of the country in one way—by advancing particular industries. The stimulation resulting from a law must be equally distributed. The levees on the Mis-

concurring opinion of Mr. Justice BRADLEY, in *Legal Tender Cases*, 12 Wall, 555.

concurring opinion of Mr. Justice BRADLEY, in *Legal Tender Cases*, 12 Wall, 556.

concurring opinion of APPLETON, C. J., in *Brewer Brick Co. v. Brewer*, 62

may, however, that a town cannot enter into manufacturing or business on its own account, as was said by the members of the Supreme Court, 58 Me., Appendix, 590; and in *Atty.-Gen. v. City of St. Louis*, 37 Wis., 400, seems nothing more than an attempt by the Government to fasten on our descendants our own opinion as to the advisability of particular industries being carried on exclusively by private enterprise. As we, as a people, practically hold unanimously to this opinion, such considerations make very little difference. But should any considerable number of our people alter their opinions on this subject, such decisions as to what ought to be unnecessary, and, therefore, probably to be changed in our Constitution. See on this head opinion of Judges, 12 Wall, 592.

HARVARD LAW LIBRARY

Mississippi stimulate the growing of cotton more than the growing of wheat, just as the tariff on cotton goods stimulates their manufacture more than the manufacture of woollens. If the sugar bounties are unconstitutional, simply because they stimulate a particular industry, then every section of the McKinley Bill is unconstitutional.¹ We have no sympathy with the position of one who upholds a protective tariff, because the nominally declared intention of the Tariff Act is to equalize duties while condemning bounties. Many an Act of the State legislatures, nominally to preserve the health of the community, has been declared unconstitutional, because its evident intention was to regulate commerce,² and we do not see why the courts cannot apply the same medicine to Congress. If bounty legislation is unconstitutional, so is a tariff. Now, however unwise, as an economist, I may possibly consider the protective tariff, or the bounty system, as a lawyer I must protest against an attempt to make the Judiciary fasten a particular economic doctrine on the people of the United States; especially, when probably the majority of the people distinctly believe in a different economic policy. Such a construction of our Constitution would, in the eyes of the majority, make the Federal Government, as at present constituted, impotent in the face of great industrial needs; and, to borrow a thought from a great publicist—Nothing so surely leads to despotism as the impotency of government.

¹ Mr. Chamberlayne's Article, 343.

² *Minnesota v. Barbier*, 136 U. S., 313; *Bremen v. Rebman*, 138 U. S., 78.

SUPREME COURT OF APPEALS OF VIRGINIA.¹

ADMIRAL. *v.* NORFOLK AND WESTERN RAILROAD.

SYLLABUS.

Negligence — Independent Contractor — Respondent Superior.—A company made a contract with A to build a bridge. The company agreed to furnish the material, and, through their chief-engineer, gave the right to criticise the work, but not to control it. The chief-engineer, among whom was the plaintiff's intestate—were engaged and directed the contractor, whose foreman directed their movements. In consequence of the foreman's negligence, a train fell through the bridge and the plaintiff's intestate was killed. In an action by his administrator against the railroad, it was held (1) that A was an "independent contractor" and that the relation of master and servant did not subsist between the railroad company and the plaintiff's intestate; and (2) that the railroad company was not liable to the plaintiff for the negligence of the foreman.

See *W. Ry. Co.* (6 Hurl. & N., 488) and *Chicago v. Robbins* (2 Black, 486) approved; *Butler v. Hunter* (7 Hurl. & N., 826) and *Scammon v. Chicago* (5 Ill., 424) followed.

STATEMENT OF THE CASE.

The Norfolk and Western Railroad contracted for a gross sum of \$100,000 with one Fred. H. Smith—a professional bridge-builder of large experience—for the erection of an iron bridge over Big Otter River, in place of a wooden bridge at that point, the work to be so carried on so as not to interfere with the running of the company's trains. By the terms of the contract the company was to furnish all material, including that required for the abutments, or a carry span, which was made necessary by the plans in order to support the weight on the bridge, while the work was being done. The company did not furnish enough material for trestling from pier to pier, but only for a trestling next each pier, leaving a space of 100 feet in the centre unsupported; but that furnished was of sufficient strength and the contractor made no request for more. In a conversation with the company it was agreed between the contractor and the chief-engineer of the company, who acted as its representative, that this contract should be subject to the provisions of a former contract for the erection of another bridge, which provided that the contractor should use every precaution and safeguards against accidents or injuries, and should keep the company harmless from all damages recovered against it on account of accidents or damage not due to obeying the written orders of the chief-engineer, under protest. The work was also to be subject to the supervision of the chief-engineer of the company, who had the right to stop the work at any time.

Reported in 14 S. E. Rep., 163, and 87 Va., 711.

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to criticise the method of erection and the workmanship, but not to direct the method of erection. He could stop the trains, however, if the bridge was unsafe. His subordinate, who had the same powers, was on the spot every day, and the day of the accident had but just left the bridge when it fell.

All the workmen were engaged and paid by the contractor, and the work was done under the direction of his foreman. It was agreed between the parties that the company's trains should not pass over the bridge during its erection until the signal to pass should be given by the foreman. At the time of the accident two of the spans were complete; one had not been touched, and the fourth was incomplete, the old work having been cut away, and the new work not yet sufficiently braced and strengthened. The foreman gave the signal to cross to a heavy coal train, and while it was crossing the bridge gave way and fell, in consequence of the incomplete condition of that span, and caused the death of the plaintiff's intestate, who was one of the contractor's workmen, engaged in the erection of the bridge.

OPINION OF THE COURT.

RICHARDSON, J. (after stating the facts), said :

The question presented by the record before us is one of first impression in this State, and is one of great practical importance. It is whether a railroad company, or any person, natural or artificial, who undertakes the erection or repair of a building or other work for his own benefit, is responsible for injuries to third persons, occasioned by the negligence of a servant of the builder or the person who is actually engaged in erecting the building or other work under an independent employment or a general contract for that purpose. Such is the general scope and bearing of the question presented. But in the light of the peculiar circumstances of the case in hand, the question is one of yet more special significance, and may be stated thus: Can the railroad company in this case be held liable in damages for the death of the plaintiff's intestate, the latter, at the time of the accident, which resulted in his death, being the employee and servant, not of the railroad company, but of one Fred. H. Smith, who was at the time in the exercise of an independent employment, and engaged in erecting the bridge over Big Otter, under a contract with said company, the work to be done for a stipulated price for the job complete, the railroad company reserving

control as to the means and methods of doing
contracted for? The question thus stated presents
the case made by the pleadings and facts certified
and upon which our decision must be based.

are at the proper solution of the question above
it is necessary, in the first place, to inquire
constitutes an independent contractor. In Me-
table work on Agency, he makes the following
ment of the law: "The principal's liability for
s agent, within the scope of his authority, de-
he fact that the relation of principal and agent
s the principal's will that is to be exercised;
that is to be accomplished; his are the benefits
ges which ensue. He selects his own agent,
motion, and has the right to direct and control

It is, therefore, just and proper that he should
le for what the agent does while so employed.
ver, the principal has not this right to control,
ule prevails. Neither reason nor justice re-
ne should be held responsible for the manner
act when he had no power or right to direct or
anner."¹ And in this connection the author
approbation the remark of Baron ROLFE, in
ailway Co.,² "that the liability of any one other
rty actually guilty of any wrongful act pro-
maxim *qui facit per alium facit per se*. The
ying has the selection of the party employed,
asonable that he who has made choice of an
careless person to execute his orders should be
or any injury resulting from the want of skill
are of the person employed; but neither the
the rule nor the rule itself can apply to the
ie party sought to be charged does not stand in
of employer to the party by whose negligent act
s been occasioned." The same author further
herefore, the principal, using due care in the
he person, enters into a contract with a person
independent employment, by virtue of which

g., § 747.

² 4 Exch., 255.

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the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relations of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent when the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." And the author further says: "The independent contractor is usually paid, in the common parlance, by the job; but the fact that he is paid by the day does not necessarily destroy the independent character of his employment." "This rule of immunity from liability," says the author, "is, however, subject to certain exceptions. No one can lawfully delegate to another the authority to do an unlawful act, nor can one upon whom the law imposes the performance of a duty relieve himself from responsibility for its non-performance by committing its performance to a substitute. Thus, if the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent or independent contractor, is as much liable for injuries which may happen to third persons from the act done as though he had done the act in person." "So it is the duty," says the same author, "of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken; and he cannot escape this duty by turning the performance over to a contractor. Of the same nature is the duty which the law imposes upon every person, who, for his own purposes, brings on his lands, and collects or keeps there, anything likely to do mischief if it escapes, to keep it in at his peril; and, if he does not do so, he is

prima facie answerable for all the damage which is the natural consequence of its escape."

In stating the first branch of this proposition, the author was not as guarded in the language employed as he might and perhaps should have been, in the light of the decided cases upon which he seems to have based his statement of the principle. The language, at first blush, seems to be open to the interpretation that every person, natural or artificial, who does in person, or causes to be done by another, work which from its nature is liable, unless precautions are taken, to do injury to others, must see to it in person that the necessary precautions are taken, and cannot escape liability for the non-performance of such duty by turning the whole performance over to a contractor, although the employer has exercised proper care in the selection of a skilful and competent person, exercising an independent employment, and has contracted with such person for the execution of the entire work by the means and methods of his own selection. Work is constantly being performed by independent contractors, as well as others, which, in the nature of things, may, in the course of its execution, result in injury to others; but it by no means follows that an employer in any such case must personally supervise the work and see that the necessary precautions are taken, and that for his failure to do so he must be held liable in damages for injuries to other persons; for if, in the nature of things, the mere liability of the work to result in injury to some one be made the test, then it is obvious that the line of distinction becomes shadowy and indistinct between acts which are unlawful or are *per se* nuisances, or that cannot be done without doing damage, and those the performance of which not only may, but, in the nature of things, must, often be committed to others; as in the case with a railway company in the construction and repair of its roadway, bridges and other structures. This view seems to be in unison with the real meaning of the author himself, if we are to judge by the decided cases to which he refers; for immediately in connection with his statement of the distinction now under consideration he makes this remark:

"This distinction has been stated in a recent case, as follows," referring to and quoting the language of POWERS, J., in *Bailey v. Railroad Co.*,¹ where it is said: "If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work. If, however, the work is one that will result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do to prevent such injurious consequences. In the latter case the duty to so conduct one's own business as not to injure another continuously remains with the employer." There is manifestly a broad distinction between the statement of the author (Mechem) and that of the judge whose language is quoted, as illustrating the distinction stated by the former. In the former the author makes the fact that the act to be performed is, in its nature, liable to result in injury to others, the test; while the judge, whose language is quoted, applies as the test the fact that the work is one that will result in injury to others unless preventive measures be adopted. But we find the principle nowhere more justly, clearly and satisfactorily stated than in 2 Wood, Ry. Law, § 284, pp. 1012, 1013, where the author, quoting the language of APPLETON, J., in *Eaton v. Railway Co.*,² says: "When the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Unless, therefore, the relation of master and servant exist, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if those acts are outside of the contract. If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible." The same author then proceeds to say: "If the company can be said to have co-operated in the act which produces the injury, it is liable; and this is always the case when

¹ 57 Vt., 252.² 59 Me., 520.

ust necessarily be productive of a nuisance ;"¹ author adds the remark : " In all cases it will be that the act was to be done in a lawful manner, proper care and skill."

principle just stated is well illustrated by the case *v. Railway Co.*,² reported with *Hobbit v. Railway Co.*³ *supra*. In that case the railway company had let contract the building of a viaduct, which was a part of their railway, to contractors. Through the negligence of the men employed by the contractors a heavy stone fell from the work, and, falling upon the wife of a man, who was lawfully passing along the viaduct, killed him ; and in an action by the wife for this death it was held that the company was not liable. And in giving the opinion of the Court Baron ROLFE used the following language : " The liability of any one other than the party actually guilty of any wrongful act proceeds on the principle that *qui facit per alium facit per se*. The party employed is responsible for the selection of the party employed, and it is not the fault of the person who has made choice of an unskilful or incompetent person to execute his orders should be responsible for any injury resulting from the want of skill or want of care of the person employed ; but neither the principle of negligence nor the rule itself can apply to a case where the injury is occasioned by the act of a third party who has no right to be charged does not stand in the character of an agent of the party by whose negligence the injury was occasioned." And the learned Baron, in support of the principle thus presented, referred to the cases of *Quarman v. Atterton*,⁴ *Rapson v. Cubitt*,⁵ and *Milligan v. Wedge*,⁶ applying the principle ; and then in recognition of the principle, laid down by LITTLEDALE, J., in *Laugher v. Moore*,⁷ the same learned Baron remarked in substance that the railway company was liable would

Railroad Co. v. Meador, 50 Tex., 77 ; *Robinson v. Webb*, 11 Ellis v. Gas Co., 2 El. & Bl., 767 ; *Peachey v. Rowland*, 13 Mead v. Railway Co., 4 Exch., 244 ; *King v. Railroad Co.*, 10 Q. B., 495 ; *Congreve v. Morgan*, 5 Duer, 495.

¹ 244.
& W., 709.
& C., 560.

² 6 Mees. & W., 497.

³ 12 Adol. & E., 737.

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be equivalent to deciding that the contractors—whose servant did the injury, were not liable—a proposition which could not be maintained. *Laugher v. Pointer*, *supra*, was an action to recover damages for an injury done to a horse of the plaintiff, by the negligence of another person, under these circumstances: The defendant owned a carriage, and hired of a stable-keeper a pair of horses and a driver, to draw it for a day or a short time. The injury for which the suit was brought was the result of the carelessness of the driver while the defendant was riding in the carriage. The plaintiff brought this action against the owner of the carriage. The judge before whom the case was tried non-suited the plaintiff, and a strong attempt was made for a new trial, both in the king's bench and exchequer chamber, which failed, on account of a disagreement among the judges in both courts as to the question whose servant the driver was that did the injury—whether, in the act of driving, he was the servant of the defendant, who was riding in the carriage, or of the stable-keeper, who sent him with the horses to draw it. In this case, LITTLE-DALE, J., put his opinion that the owner of the carriage was not liable for the injury done to a third person by the negligence of the driver, on the ground that the driver could not be the servant of both the stable-keeper and the owner of the carriage; and the learned judge remarked that the driver “was the servant of one or the other, but not the servant of one *and* the other; that the law did not recognize a several liability in two principals.”

*Quarman v. Burnett*¹ is the case of *Laugher v. Pointer* over again. In that case the defendants, who were the owners of the carriage, hired a pair of horses from another person, and a driver to drive them to the carriage for a short time, during which an injury was done to the plaintiff's horse and chaise by the carelessness of the driver, for which the owner of the horse and chaise brought his action against the owners of the carriage. The defendants pleaded—*First*, not guilty; *second*, that the carriage and horses, or either of them, was not under the care of the defendants.

¹ 6 Mees. & W., 497.

Upon the trial the jury found a verdict for the plaintiff, and the judge reserved the right to move to enter a non-suit. On the decision of this motion Baron PARKE delivered the opinion of the Court, which was that the defendants were not liable, and that a rule be made absolute to enter a verdict for them. In the course of his very able opinion, the learned Baron says that, "upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stands in the relation of master to the wrongdoer,—he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey. But the liability, by virtue of the relation of master and servant, must cease when the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another." The decision in *Quarman v. Burnett* was approved of and followed in *Rapson v. Cubitt*,¹ and in the case of *Reedie v. Railway Co.*, *supra*, and in a great many later English cases; and the doctrine of these cases was adopted by Judge STORY in his "Commentaries on the Law of Agency."² And the same principles, especially as laid down by Lord TENTERDEN and LITLEDALE, J., in *Laugher v. Pointer*, and by Baron PARKE, in *Quarman v. Burnett*, were recognized and followed by this Court in *Muse v. Stern*³ without any qualification whatever.⁴

Milligan v. Wedge,⁵ is another case that powerfully illustrates the propriety of the rule that exempts an employer from liability for injuries resulting from the carelessness of an independent contractor or his agents or servants, where the employer has exercised due care in the selection of a competent and skilful contractor, who employs and pays his own workmen, who are subject to his orders only, and who does the work by means and methods of his own selection. In that case the rule of *respondeat superior* was

¹ 9 Mees. & W., 709.² (2d Ed.) § 453b.³ 82 Va., 33.⁴ See opinion of HINTON, J., in that case.⁵ 12 Adol. & E., 737.

fully and ably considered upon these facts : The defendant, who was a butcher, had bought a bullock at Smithfield market, in the city of London, where persons who drive cattle for others are required to be licensed. The butcher employed a licensed drover to drive the bullock to the slaughter-house, which was within the bounds of the city. The drover employed a boy to drive the ox, who conducted the matter so negligently that he permitted the ox, as he was passing by the plaintiff's show-room, in which he had marble chimney-pieces, etc., for sale, to run into the show-room and break the chimney-pieces, for which injury the plaintiff sued the butcher. The judge before whom the case was tried was of opinion that the boy was not the servant of the defendant. In that case WILLIAMS, J., said : "The difficulty always is to say whose servant the person is that does the injury. When you decide that, the question is solved."

In the leading New York case of *Blake v. Ferris*,¹ it was held that, where persons having a license or grant to construct at their own expense a sewer in a public street, engage another person to construct at a stipulated price for the whole work, they are not liable to third persons for any injury resulting from the negligent manner in which the sewer may be left at night by the workmen employed in its construction; that the immediate employer of the agent or servant through whose negligence an injury occurs is the person responsible for the negligence of such agent or servant, and that to him the principle *respondeat superior* applies. In that case, the opinion—a very able one—was delivered by Judge MULLETT, in the course of which he says: "The rule of *respondeat superior*, as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and to the subjects to which that relation extends, and is co-extensive with it, and ceases when the relation itself ceases to exist. It is founded on the power which the superior has a right to exercise over the acts of his subordinates.

¹ 5 N. Y., 48.

Therefore the rule cannot be applicable to cases where no such power exists. The absolute and direct coincidence and co-existence of the rule *respondeat superior* with the relation to which it is applicable, and to the subject-matter to which that relation extends, is an important proposition in determining the applicability of the rule;" citing, as illustrations, all the cases above referred to, and adding the remark that all of these cases are cited with approbation by Mr. Justice STORY in his "Commentary on Agency."¹ The American authorities, holding substantially the same doctrine, are too numerous for convenient citation; some of which will hereinafter be referred to. In fact, we may safely venture the remark that, upon a careful examination of all the authorities, applying to them the tests of right reason and common justice, and looking at them in the light of sound, well-settled principles, no well-considered case will be found holding a different doctrine. It is not claimed that there is that uniformity in the decided cases which is always so much to be considered. On the contrary, there are a number of cases in irreconcilable conflict with each other and with the cases above referred to; but the overwhelming weight of authority is in accord with the cases above referred to. It is safe to say that, while other causes have contributed to this conflict in the decided cases, it originated in the erroneous and monstrous doctrine held in the old English case of *Bush v. Steinman*,² in which A, having a house by the roadside, contracted with B to repair it for a stipulated sum. B contracted with C to do the work; C with D to furnish the materials. The servant of D brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned, and he was injured. The Court held that A, the owner of the house, was answerable for the damage sustained. Thus the owner of the property, notwithstanding he had let the work to a contractor, was held liable for absurdly remote and inconsequential damage. But for the authoritative report of the case it could scarcely be believed

¹ § 453, a, b and c.

² 1 Bos. & P., 404.

that any court of high authority ever made a decision so utterly opposed to reason and justice. But that case was decided nearly one hundred years ago, when many crude doctrines were advanced that are now disregarded as unsound, misleading and unjust. The doctrine of that case, from its inception, met with stern resistance from bench and bar. In subsequent English cases it was sometimes urged as the settled law of that country, but was doubted and avoided by the English judges; in others it was not referred to by either counsel or court; and, finally, after a somewhat equivocal controversy, lasting some fifty years, it was entirely overturned and repudiated in the case of *Reedie v. Railway*, *supra*; in which Baron ROLFE said that, "according to the modern decisions, *Bush v. Steinman* must be taken not to be law; or, at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded." The contest was renewed in this country, and in *Hilliard v. Richardson*,¹ in an exceedingly able opinion by Judge THOMAS, expressing the unanimous opinion of the Supreme Court of Massachusetts, all the authorities, American and English, were elaborately and ably reviewed, and the doctrine of *Bush v. Steinman* was repudiated out and out, it being demonstrated that the case promulgated a doctrine which had no existence in England prior to that decision, and that it was not law in either England or America; and the Supreme Court of Massachusetts held that the owner of land, who employs a carpenter, for a specific price, to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair. This case of *Hilliard v. Richardson* is entitled to peculiar weight and influence, not only by reason of the carefully considered and able opinion delivered by Judge THOMAS, but because it was decided by a bench of judges presided over by that eminent jurist, Chief Justice SHAW.

¹ 3 Gray, 349.

The character of the decisions in conflict with those above referred to, and the untenable ground upon which they rest, may be well illustrated by a brief comparison—*First*, of two English cases—*Hole v. Railway Co.*,¹ and *Butler v. Hunter*;² and, *second*, of two American cases—*Scammon v. City of Chicago*,³ and *City of Chicago v. Robbins*.⁴

Hole v. Railway Co. was a case in which the defendant company was authorized by Act of Parliament to construct a drawbridge across a navigable stream; the Act providing that it should not be lawful to detain any vessel navigating the river for a longer time than was necessary to enable any carriages, animals or passengers ready to traverse to cross the bridge, and for opening it to admit such vessel. The defendant company employed a contractor to construct the bridge, and by some defect in the construction of the draws the bridge could not be opened, and the plaintiff's vessel was thereby prevented from navigating the river, and the Court held that the defendant company was liable. The opinion was delivered by POLLOCK, C. B., who, in the course of his opinion, said: "Where a person is authorized by Act of Parliament, or is bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work;" quoting the remark of Lord CAMPBELL in *Ellis v. Gas Co.*, *supra*, where it is said: "It is a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of the opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself." No one will controvert the accuracy and justness of this remark of Lord CAMPBELL, for, under the rule above laid down, if a man employ another to do an unlawful act, or an act that is *per se* a nuisance, he, of course, as well as the person who was employed and did the act, would be liable; otherwise the act to be done was in itself lawful, and the injury re-

¹ 6 Hurl. & N., 488.

² 25 Ill., 424.

³ 7 Hurl. & N., 825.

⁴ 2 Black, 418.

sulted from the carelessness of the contractor of his agents and servants. But the learned Chief Baron proceeds to say, in substance, "When the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable *because* [*italics the writer's*] *he never authorized that act; the remedy is against the person who did it.* But when the contract is to do a particular act, the doing of which produces mischief, another doctrine applies." What other doctrine is it, we ask, that then applies? None other than what is comprehended in any one of the prominent exceptions to the rule above laid down that exempts an employer, under certain circumstances, from liability for injuries resulting from the carelessness of a contractor or his agents or servants; for instance, if the act to be done is in itself unlawful, or if it is *per se* a nuisance, or cannot be done without damage to third persons, then, in either event, the employer is liable, as much so as if he did the act himself. But POLLOCK, C. B., proceeds to say; "Here the legislature empowered the company to build the bridge. In building that bridge the contractor created an obstruction to the navigation, and for that the company are liable. . . . So here it was the duty of the company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do, what materials he would use, and to have seen that the specifications and materials were such as would insure the construction of a proper and efficient bridge." The learned Chief Baron was, however, careful to add: "But I do not rest my judgment on that ground, but simply on this: that there is a distinction between mischief that is collateral and that which directly results from the act which the contractor agreed and was authorized to do." This reasoning is palpably unsound, at variance with the remarks of Lord CAMPBELL, quoted by the learned Chief Baron, and wholly inapplicable to the case under consideration. The report of the case shows that the railway company let the work to be executed according to the requirements of the Act of Parliament, and that the injury complained of occurred

during the erection of the bridge, and before it was completed and turned over to the company. Though the report of the case does not show precisely how it occurred that the draw failed to open on that occasion, it is quite likely that for some unforeseen cause there was a mere temporary obstruction to the navigation, in which case common fairness would dictate a liberal construction of the statute in favor of the company, and even the contractor, the bridge being a work of public importance, superior to the interest of the private ship-owner, whose vessel was only temporarily detained. But, however this may have been, Chief Baron POLLOCK puts his judgment upon the distinct but untenable ground that the mischief was the direct result of doing the thing which the contractor agreed to do and was authorized to do, when, as before stated, the company let the work to the contractor, to be executed according to the requirements of the Act of Parliament. What possible reason or excuse, then, could there have been for the ruling, which, in effect, held that the railroad company deliberately employed and authorized the contractor to do an unlawful act to construct the bridge so as to obstruct the navigation of the river? And strangest of all is, that the Chief Baron quotes with approbation the language of Lord CAMPBELL in *Ellis v. Gas Co.*, *supra*, which by no means sustains the conclusion arrived at in *Hole v. Railway Co.*, the judgment in which cannot possibly be upheld on the ground upon which it was put, nor upon any now recognized principle or rule of decision. One year later the same learned judge, in the same court, decided the case of *Butler v. Hunter*, *supra*, in which, upon principle, he practically repudiated the doctrine held by him in the former case. In *Butler v. Hunter* the defendant employed an architect to repair his house, and it became necessary to take down and rebuild the front thereof, and the work was let to a builder. The plaintiff was the owner of the adjoining premises, between which and the defendant's house there was a party-wall, fourteen inches thick, and in front of the defendant's house what is called a "brest-summer," one end of which was inserted into the

party-wall about six inches. In removing the front of the defendant's house the contractor's workmen removed the brest-summer, and, not having shored up the plaintiff's house, the front wall thereof fell, and he was considerably damaged thereby. It appeared that the work might have been done with safety if the wall had been shored up, which was the ordinary and usual precaution adopted in such cases, and the Court held that the defendant could not be held chargeable. "I think," said POLLOCK, C. B., "that, as a matter of fact, if a person gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesman-like way, and the employer has a right to presume that he will do it in that way; and, if he is guilty of no negligence in the selection of a contractor, he cannot be held chargeable because he did not personally see to it that the work was done so." In this case, too, the position was taken and ably argued by the plaintiff's counsel that, inasmuch as injury might result from a careless execution of the work, the defendant was personally bound to see to it that such precautions were taken as to prevent it; but the Court repudiated the doctrine, and held expressly that this duty was only imposed where the injury was consequent upon doing the work in the ordinary mode; and such is the rule established by the decisions, both in England and in this country.

Thus stand the two English cases. They cannot be reconciled upon principle. They were decided by the same judge. In the one case he said it was the duty of the railway company to see how the contractor was about to construct the bridge; that it was the duty of the company to ascertain what he was about to do, and what materials he would use, and to have seen that the specifications and materials were such as would insure the construction of a proper and efficient bridge, though the judgment was put upon an entirely different ground. In the other case he expressly held and based his judgment upon the ground that the work having been let to a contractor, selected with due care, the employer had a right to presume that the work would be done in the ordinary and

-like way ; that he was not bound personally to see to it how the contractor intended to do or get, doing the work. The language used by POLLOCK, C. B., in *Hole v. Railway Co.*, involves a manifest

Railroad companies, for reasons of sound public policy, are treated as persons—artificial persons—and, to the extent that they are inhibited by their charters under general law, they may contract and be contracted with, and be sued, and in general conduct their affairs as natural persons do. Their corporate affairs must, however, be entrusted to the human agency, for their roads and necessary structures can only be constructed and repaired by the same instrumentalities. If, therefore, to the doctrine held by POLLOCK, C. B., in *Hole v. Railway Co.*, such a company, after exercising its right in selecting a competent and skilful contractor, entrusts the work to him, and must see to it in person that the work in all its details is so done as to be safe, it is at once obvious that a duty is imposed which cannot possibly be performed. The personal supervision of the board of directors and all the stockholders combined could but confuse matters and lead to great mischiefs, because, if not utterly incompetent, they could never agree among themselves what should be done and how. Must a railroad company have, at every point along its line of road, where its important structures are erected or repaired, not only a competent and experienced but an infallible, engineer, to superintend its work, direct contractors, and direct and control them in all the details of their work? If so, then there is an end to independent employment, for no sane man would subject himself to the risks which such an arrangement would involve, as he could make no safe calculation upon compensation with satisfaction to his employer, or with profit to himself. Must the work the details of which are subject to the supervision and control of another. In other words, the important and well-recognized distinction between the relation of employer and contractor and that of master and servant would cease to exist, and every contractor, no

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matter how skilful and competent he may be, would become the mere servant of his employer. Such, in effect, is what is said by POLLOCK, C. B., in *Hole v. Railway Co.*, *supra*, and is practically what is contended for in the present case. No such view can be upheld upon either principle or authority. It can but be obvious to every impartial mind that when any person, natural or artificial, and especially the latter, has, in the exercise of due care and caution, selected a competent and skilful contractor, and has committed the work to be done to him, at a stipulated price, and to be done in the approved workmanlike way, and the work be lawful, and such as can be accomplished without injury to third persons if done in the usual workmanlike way, then the utmost degree of care and caution has been exercised that can in reason and justice be required of any employer. This view, of course, is confined to cases like the present, and has no application to cases of injury to passengers or to employees of a railroad company, resulting from the negligence of such company; for, as will be presently more fully shown, in the present case the relation of master and servant did not exist between the railroad company and the plaintiff's intestate, nor was he a passenger on the company's road; so that no claim to a recovery can be based upon the principles applicable to either of those relations.

Now let us compare the two American cases—*Scammon v. City of Chicago*, and *City of Chicago v. Robbins*—above referred to. In the first-named case the Supreme Court of Illinois held, reversing the court below, that an owner of land, who contracts with a skilful party to erect a building thereon, and who for that purpose surrenders the premises for the uses of the contractor, is not, during the erection of the building, answerable in damages for an accident which occurs to a stranger passing by; that, if the sufferer has any recourse, it is against the contractor, or the corporation within which the property is situated; that the parties who may be accused of negligence under such circumstances are not the servants of the owner of the premises, but of the contractor. In the other case (*City of Chicago v. Rob-*

bins) the Supreme Court of the United States, reversing the Federal District Court, overruled in part the doctrine held by the Supreme Court of Illinois in the first-named case of *Scammon v. City of Chicago*. The extent to which the doctrine so held was disapproved by the Supreme Court of the United States appears in the opinion of Mr. Justice DAVIS, where he says, after adverting to the fact that the defendant's counsel had cited and relied on *Hilliard v. Richardson*,¹ and *Scammon v. City of Chicago*,² that "*Hilliard v. Richardson* was a most elaborate and able discussion of the doctrine of *respondeat superior*, and the authorities in this country and England were fully reviewed, and we see no reason to question the conclusion at which the Court arrived. But that case and the one at bar were not at all alike. That was a case where the owner of a building contracted with a carpenter, at an agreed sum, to repair it; and a teamster, who was employed by the carpenter to haul boards, left them in the street in front of the lot, and an accident happened. The teamster, when he placed the boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and in no sense can the injury be said to happen from the doing of that defectively which the owner directed to be done. The owner was correctly held not liable, and one of the grounds on which the Court placed its decision was, that it was not a nuisance erected by the owner of the land or by his license, to the injury of another." Such is the comment of Mr. Justice DAVIS on the case of *Hilliard v. Richardson*, in which he obviously falls far short of recognizing the real scope of the decision, or the principles upon which that decision rests. He admits it to be a most elaborate and able discussion of the doctrine of *respondeat superior*, in which the authorities in this country and England were carefully reviewed, and that he saw no reason to question the conclusion arrived at in that case. But he says that case and the one he had in hand (*City of Chicago v. Robbins*) were not at all alike. Viewed in the light of principle and reason,

¹ 3 Gray, 349.² 25 Ill., 424.

this is a somewhat remarkable distinction—a distinction without a difference. In both cases the owner let the work to independent contractors; in both the mischief resulted from the carelessness of the servants of the contractors. In other words, in *Hilliard v. Richardson*, the contractor, who had undertaken, at an agreed price, to repair the house of the contractee, employed a teamster to haul boards, and the teamster, who was the servant of the contractor, and not of the owner, left the boards in the street in front of the house, by reason whereof the mischief occurred. In *City of Chicago v. Robbins*—the case Mr. Justice DAVIS was considering—the contractor made, at an agreed price, an excavation or pit in the sidewalk of a public street for area lights, and his servants left the pit insecurely covered, and the mischief complained of was the result. Now, upon principle, what conceivable difference is there in the two cases? None that we can perceive; for, if negligence there was, it was, in each case, the negligence not of the owner or proprietor, but of the servant of the contractor, for which the contractor, and not the owner of the property, was liable. “But,” says Mr. Justice DAVIS, “the teamster, when he placed the boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and in no sense could the injury be said to result from doing defectively that which the owner directed to be done;” and the owner was correctly held not liable. This reasoning is plainly fallacious. If leaving the boards in the street was a work collateral to that which the owner let to the contractor, by reason whereof the owner was exempt from liability, the same was essentially true of the act of the servants of the contractor, in the case Mr. Justice DAVIS was deciding, in leaving the pit, dug in the street for area lights, uncovered and unguarded. In each case a dangerous obstruction was placed in a public street, and in each the result was injury to a third person. The obstructions thus created could be said to differ only in degree. But what possible difference could it make to a man whether an injury received by him was the result of leaving a pile of boards or other material in a public street, or

result of leaving a hole or pit therein for area lights, and unguarded? If, on principle, there is any, we fail to perceive it. It is therefore manifest in each case the mischief resulted from the act of the contractor, it necessarily follows that in each case the owner or proprietor should have been held not liable, if it was not pretended that the work let to contract was unlawful. And Mr. Justice DAVIS, in his opinion on the case of *Scammon v. City of Chicago*, *Scammon v. City of Chicago* is similar in many of its points to the case he had under consideration—*City of Chicago v. Robbins*—and is decided differently.” And, in referring to the decision of the Supreme Court of Illinois, he says: “That Court held, as we do, that negligence necessarily occurs in the ordinary mode of doing work, the occupant or owner is liable; but if it is the negligence of the contractor or his servants, then the contractor alone be responsible.” But the Court also held that the omission to cover the opening in the area did not constitute an incident to the prosecution of the work, a rule to which we cannot assent, and which we are opposed to reason and authority.” Thus, in plain and unequivocal terms, Mr. Justice DAVIS states his only ground of dissent from the decision in *Scammon v. City of Chicago*. It is only that the Illinois Court held that “the omission to cover the opening in the area did not necessarily constitute an incident to the prosecution of the work;” and this only, was the ground of dissent. The dissent from is in exact accord with the numerous precedents before referred to and relied upon, and is sound in principle, as well as sustained by ample authority. That conceivable principle, we ask, can it be said that the negligence of a servant of an independent contractor in the prosecution of a work which, in itself, is a necessary incident to such work? To hold any other doctrine would be, in effect, to hold, as was the case in *Chicago & North Western Railway Co., supra*, that to let work to a competent and skillful contractor is, in effect, tantamount to an assumption on the part of the employer or owner of respon-

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sibility for all injuries resulting from the carelessness of the contractor, his agents or servants. In other words, it would be to hold that, in letting to contract a lawful work, the contractee, owner or proprietor becomes necessarily responsible for every unlawful or careless act done by the contractor or his servants in the prosecution of such work. To uphold any such doctrine would be unjust and oppressive, and opposed to both principle and authority.

We have thus compared the two English cases—*Hole v. Railway Co.* and *Butler v. Hunter*. Upon both principle and authority we feel constrained to reject the doctrine laid down in the former, and to approve that in the latter case. So as to the two American cases—*Scammon v. City of Chicago*, and *City of Chicago v. Robbins*—we can but approve the decision in the former, as resting well on principle and authority, while we reject the latter as opposed to both. We may safely venture the remark that a careful examination of all the authorities, American and English, will show that all the decisions which, like *Hole v. Railway Co.* and *City of Chicago v. Robbins*, are opposed to the conclusion arrived at in the present case, have an obvious leaning toward the unjust and oppressive doctrine held in the old English case of *Bush v. Steinman*, *supra*, which was long ago repudiated in both England and this country.

But in the present case the plaintiff relies with confidence on the case of *City of Chicago v. Robbins*, *supra*. That case, however, can have no application to the case in hand, as, in addition to what has already been said, the judgment therein was distinctly placed upon the ground that the work, which was left unguarded, became a nuisance. In the course of his opinion in that case Mr. Justice DAVIS said: "This area, when it was begun, was a lawful work and, if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby it became a nuisance, and the owner of the lot, for whose benefit it was made, is responsible." This is just the principle upon which the judgment proceeded in *Bush v. Steinman*. But however this may be, the language of the

ve quoted, shows that the judgment was put upon
d that work, which was lawful in its inception,
nuisance, and that upon that ground the owner
perty was held liable. It is not pretended, in the
se, that the work in question was unlawful, or
any cause, it became at any time a nuisance ; so
ase of *City of Chicago v. Robbins* can have no
n whatever. As was said by Baron ROLFE, in
Railway Co., *supra*, the wrongful act here could
possible sense be treated as a nuisance. It was
act of negligence, and that was the inopportune,
et of Englesby, the agent or servant of Smith, the
, in ordering the signal to be given for the train
er the bridge when it was unsafe, when, had he
t may have been a very short time—all would
a well. But he did not wait, and his grossly
act was the sole cause of the disaster which fol-
d for that negligent and careless act, which re-
fatally to the plaintiff's intestate, Smith, the
, is responsible, and not the railroad company ;
ween the said contractor and Englesby, his fore-
was the real author of the mischief, the relation
al and agent or master and servant did exist, and
principle *qui facit per alium facit per se*, Smith,
r, is alone responsible. As between Smith, the
and the plaintiff's intestate, Bibb, the relation
and servant also existed. Bibb was employed
by Smith, and bound to receive and obey his
He owed no special duty to the railroad company,
e latter owe any such duty to him. The com-
r by contract, express or implied, undertook to
and protect him against injury ; nor had he any
ok to it for the performance of any such duty.
plaintiff's intestate, stood in the shoes of his
ho was Smith, the contractor ; and was entitled,
ds of the company, to no other or higher duty
due from it to Smith. There is no evidence, nor
ended, that the railroad company was guilty of
e or carelessness in the manner of running its

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trains on the bridge, after the signal was given to cross. On the contrary, it is a fact certified, that the train was moving at the rate of three or four miles per hour—a rate of speed not exceeding that of an ordinary pedestrian on a common country road.

In the light of the facts certified, and the principles of law applicable thereto, it is obvious that the rule *respondeat superior* has no application in the present case. The relation of master and servant did not exist between the railroad company and Smith, the contractor, by the negligent or wrongful act of whose agent or servant the injury was occasioned. It is, therefore, obvious that in no possible sense can it be said that the railroad company stood in the relation of master to either Smith, the contractor, or to his foreman, Englesby. The facts of this case incontestably show that Smith was an independent contractor in the broadest sense of the term. He was, moreover, an engineer in good standing; that he followed an independent calling, had had extensive experience in the construction and erection of iron bridges, and was a professional and practical bridge-builder of repute, and had recently erected several important bridges for the defendant company; that he contracted to build the bridge in question, according to plans and specifications previously agreed upon; that in its construction he selected, employed and paid his own workmen, who were subject to his orders only, and he was to receive a fixed price for the work complete; and that, while the company's chief-engineer and his assistants had the right to criticise both the methods and workmanship, they did not have the right to direct the methods to be employed by the contractor in the erection of the bridge. There is, therefore, no possible sense in which it could be said that the relation of master and servant existed between the railroad company and the contractor, or between it and Englesby, the agent or servant of the contractor; and, in the absence of such relation, there can be no liability on the company. Yet it is strenuously contended, on behalf of the plaintiff in error, that Smith was not an independent contractor, but simply an agent or servant of the railroad

and that the latter is responsible for the negligent acts of Smith, his agents or servants, in execution of the work; it being claimed that it was of the company to protect the plaintiff's intestate from the consequences of the negligent and wrongful act of Smith, or his agents or servants, by refusing to run upon the bridge when it was in an incomplete and dangerous condition, although the signal for the train to cross the bridge was given in obedience to the order of the company, by Smith's foreman, and in accordance with the terms reserved to Smith in the contract that such signals should be given by Englesby's orders. This broad proposition embraces all others of minor importance asserted by the plaintiff in error, and is directly in conflict with the facts at which we have arrived, and with the numerous authorities, American and English, cited in support of the plaintiff's position. The contention is attempted to be upheld by saying that the maxim, *qui facit per alium facit per se*, and the consequential rule of *respondeat superior*, apply to the facts of this case. The rule of *respondeat superior* is not so easily understood, though the decided cases show a great diversity of opinion in its application, which, in some cases, might, to a great extent, have been avoided. In this case, however, this diversity is not traceable to any error or uncertainty in the rule itself, or to any doubt as to its correctness, but is due to the great variety and intricate facts in respect to which its application has been asked, and the yet greater difficulty in determining the facts, and, in some cases, whether or not the relation existed to which the rule is applicable. Hence, in *Milligan v. Wedge*, the remarks of WILLIAMS, J., that "the difficulty is to say whose servant the person is that does the wrong. When you decide that, the question is solved." Applying the rule of *respondeat superior*, it is of the great importance that it be not extended beyond the relation on which it is founded. By the plain import of the rule it belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and

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servant; and where that relation does not exist there can be no ground for the application of the rule. In the present case it has been shown beyond question that the person who occasioned the injury was the agent or servant of the contractor, and not of the railroad company, and that the latter cannot, in reason or justice, be held liable.

The proposition that, in the present case, Smith was not an independent contractor, but simply the agent or servant of the company, rests on several grounds of contention. Let us now briefly examine them.

1. It is contended that the right reserved by the railroad company to run its trains over the bridge during its construction destroyed the independency of the contractor's employment. Under the circumstances of this and like cases, this proposition is without the sanction of either reason or authority, and must be rejected, as opposed not only to reason and justice, but to sound legal principles, almost, if not quite, universally recognized. The obvious vice, that lies at the very root of the contention, is that it ignores the indisputable fact that Smith was an independent contractor, employed and paid his own workmen, who were subject to his orders only, and that he stipulated for and was to receive a fixed price for the work complete; ignores the plain and universally recognized distinction between the relation of contractor and contractee and that of principal and agent or master and servant, and rests solely upon the moral assumption that the reservation by the owner or proprietor of any use or enjoyment whatever of the property on which the work let to contract is to be done necessarily destroys the independency of the contractor's employment. In other words, that a railroad company or private individual cannot, in one case, build its road or other structures, or repair either; and, in the other, the owner of property cannot build a house thereon, or repair one, by the intervention of an independent contractor, without the entire surrender of the possession and use of the property to such contractor; and that, if such surrender be not made, then the employer is liable for any injury to another resulting from the negligent or tortious act of any

servant of the contractor. The recognition of any principle would not only lead to the most absurd result, but would be to foster gross injustice and oppression. The force of the proposition is well illustrated by an incident which occurred during the argument of the case of *Railway Co., supra*, when PLATT, B., put to the court the following question: "Suppose the occupier of the premises were to direct a bricklayer to make certain repairs, and one of his workmen, through his carelessness, let a brick fall upon a passer-by, is the owner liable?" This was a very pertinent question, and the defendant in that case answered it in the negative. In every case the question is not whether the owner or proprietor had any use of the property during the erection of the building, but who had the efficient control of the work to be done. Such control, in cases like the present, is necessarily vested in the contractor; and, were it otherwise, independence of employment would be degraded, its reliability in business measure destroyed, and the general efficiency of the service correspondingly impaired. Hence the rule is supported by many decided cases in which defendants were held liable for torts committed on their premises by their servants or their agents or servants, although there had been no entire surrender of the possession of the premises to the contractor. Such was the case in *De Forrest v. The City of New York*, where a grocer hired a drayman to haul salt to his store; *Forsyth v. Hooper*, 11 Allen, 419, where a bell-ringer employed a person to hoist some bells into a church.² On the other hand, as a matter of fact, the proposition contended for rests, in effect, on the unwarranted assumption that the contractor's foreman, or his employee, whose negligent act caused the injury, was at the same time two masters—the railroad company and the contractor. The proposition that the doctrine of *respondeat superior* is applicable only to the superior of the person who does the injury, and that there can be but one responsible superior, was clearly

68.

Harrison v. Collins, 86 Pa. St., 153, and *McCarthy v. Secor*, 71 Me., 318.

HARVARD LAW LIBRARY

recognized in the leading cases of *Reedie v. Railway Co.*, and *Blake v. Ferris*, *supra*. In *Laugher v. Pointer*, *supra*, LITTLEDALE, J., puts his opinion that the owner of the carriage was not liable for the injury to a third person by the negligent driving of the servant of the stable-keeper expressly on the ground that the driver could not be the servant of both the livery stable-keeper and the person riding in the carriage; and he added that he "was the servant of the one or the other, but not the servant of one and the other; that the law did not recognize a several liability in two principals."

2. It is contended that the defendant company, in its contract with Smith, reserved a degree of control over the work to be erected, which is inconsistent with the idea that Smith was an independent contractor. This contention cannot prevail. In *Thomp. Neg.*, p. 913, it is said: "The mere fact that the proprietor retains a general supervision over the work, for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him responsible for wrongs done to third persons in the prosecution of the work; as, where a railway company employs an engineer to superintend the progress of the construction of its road, and to see that the work is done according to the contract." The author then cites, *per contra*, the case of *Schwartz v. Gilmore*,¹ and adds: "This, however, is not the sound view of the usual building contract. The contractor stipulates to deliver to the proprietor certain results. He is responsible to the proprietor for these only. The proprietor does not retain control over the contractor as to his methods of proceeding with the work. He could not do so; for the contractor is generally skilled in the business, and he is not. No contractor could safely stipulate to do a job at a fixed price, and then allow the proprietor to control him in matters of method and detail; for this might destroy his power so to order the work as to make his contract a profitable one." "Accordingly it has been held that a contract between a municipal corporation and a contractor for the construction

¹45 Ill., 455.

containing the provision, 'all work to be carried on at such times and such places, and in such places, as the engineer shall direct,' and requiring the contractor to dismiss from his employment all incompetent persons, did not reduce the contractor to the position of a servant of the city, and make it answerable to the city for its negligence."¹ These views are sustained by a great number of well-considered cases, only a few of which, in those already referred to, need be cited.² The case is a complete refutation of the claim in the case that the right of inspection carried with it the right of selecting all improper workmanship. In that case, the owner of an iron mine, contracted with contractors to work it, but stipulated that the contractors, and not the owners, should be responsible for any negligence of the workmen; and the responsibility was assumed by the contractors. The mine was in proper condition when the contractors took possession; but the contract contained a stipulation that when the contractors repaired the mine, it should be done under the supervision, advice and direction of the defendant's superintendent. In delivering the opinion of the Court and commenting on this proposition, COOLEY, among other things, said: "But the case does not make the owner principal in the mine in the working of it. The owner assumes toward the contractor a duty to supervise. He does not stipulate to be the only contractor for a privilege. If the mine in this case had dismissed the superintendent, and the contractor had no right to inspect the working, no miner could complain of negligence owing to him was being neglected. The contractor had not promised to protect him or to indemnify

¹ *Ex parte Caulkins*, 85 Pa. St., 247; *Hunt v. Railroad Co.*, 51 Pa. St., 374; *Ex parte R. Neg.*, §§ 78-81. See, also, *Pack v. Mayor*, 8 N. Y., 432; *Mayor v. Mayor*, 11 N. Y., 432, which strongly sustain the same

² *Ex parte Railway Co.*, *supra*; *Barry v. St. Louis*, 17 Mo., 121; *Ex parte Railroad Co.*, 23 Iowa, 562; *Allen v. Willard*, 57 Pa. St., 374; *Ex parte Railroad Co.*, 35 N. J. Law, 17; *Eaton v. Railway Co.*, 59 Me., 437; *Ex parte Railroad Co.*, 62 Me., 437; *Samuelson v. Mining Co.*, 49 N. W. Rep., 499.

HARVARD LAW LIBRARY

him for injuries. On the contrary, it had expressly stipulated that it would assume no such responsibility. The privilege of intervention for its own protection was reserved, but the neglect of one's own interest is no wrong to others. Legal wrongs must spring from neglect of legal duties;" citing, as in point, *Reedie v. Railway Co.*,¹ before referred to. This view of Judge COOLEY is peculiarly appropriate to the case in hand, so much so that comment is unnecessary. The injury in that case was to an employee of the contractors, and the same is true in the present case. But in this case it is a singular fact that, while it is assumed that Englesby, whose negligent and careless act caused the injury, was the servant of the railroad company, yet every authority relied upon presents the case of an injury to a third person ; not a single case is cited by the plaintiff in which the injury was to an employee of the contractor. Obviously, if, as insisted, the railroad company owed to the plaintiff's intestate the duty of protecting him against injury, it could be on no other ground than that the relation of master and servant existed between them ; but it is perfectly clear that no such relation existed. It is equally clear that, as the servant of Smith, the plaintiff's intestate did stand in the relation of servant to him, and as the second person in the contract for services to be rendered by him. It is clear, therefore, that the plaintiff's intestate was not a third person or stranger, either in respect to the railroad company or Smith, the contractor, but was simply one of two persons to the contract for service between the contractor and himself. Hence the authorities respecting injuries to third persons can have no application to this case. There was no contract relation, express or implied, between the railroad company and the employees of the contractor, or either of them ; and, as between said company and the plaintiff's intestate there was no relation whatever, other than that which springs from the common bond of society, as expressed in the maxim, *sic uteri tuo ut alienum non lædas*, which imposes upon every man the duty of so using his

¹ 4 Exch., 244.

own as to do no injury to his fellow-man. It can in no just sense be said that the railroad company violated this rule, for it is not even pretended that the injury was the result of the careless manner in which the company ran its train on the bridge. On the contrary, it is certified that the company exercised due care in the selection of the material furnished, and that it was sufficient for the purposes for which it was intended ; that the bridge gave way and fell because the sway braces, lateral braces and struts had not been put in position. And it clearly appears that the mischief was the result of the wrongful act of Englesby, the contractor's agent or servant, in ordering the signal for the train to pass in the then insecure condition of the bridge.

3. And it is also contended that there was an obligation imposed by law upon the railroad company to see that its track was safe, and that it cannot shift this obligation upon an independent contractor. If the plaintiff's intestate had been either a passenger on the ill-fated train or an employee of the company, then this insistence would have some show of reason ; but he was neither, and he cannot avail himself of the principles applicable in either class of cases.

4. But, among other things, it is certified that to run a train of coal cars upon such a bridge, in such a condition, would be foolhardy ; and this is fastened upon as a conclusive reason for holding the railroad company liable, and upon the express ground that the defective and unsafe condition of the bridge was open and obvious, and could or ought to have been seen by the company's assistant engineer, Maj. Goodwin, who was on the ground at the time or just before the accident, and only three minutes before had left the bridge, passed to the rear of the train, and was in the act of mounting on to the caboose to return to Lynchburg, when he heard the crash and desisted. Is it credible that he would thus have imperilled his life by attempting to ride over the bridge in the caboose attached to the very train under which the bridge fell if the danger was open to common observation? We think not. The

question whether the span which fell was, in any particular stage of its progress, safe, was, in the nature of things, one to be determined by Smith or his foreman, Englesby, by whom he acted. This is well illustrated by the correspondence between the parties, leading up to the contract in question. In a letter written by Smith to Chief Engineer Coe, dated Baltimore, December 9, 1886, he says: "Replying to yours of the 1st inst., I write that, during my late absence at St. Louis, etc., my best draughtsman worked out the drawings for the removal of Big Otter bridge; and when I came to checking them up, within a few days, I found that the premises assumed were a little out, and a new study is required. This will probably delay matters a few days," etc. Now, was it competent for the assistant engineer, Maj. Goodwin, to interfere and delay the work until he could study the situation upon some theory of his own? Certainly not; for, in the first place, he had no such right under the terms of the contract; and, in the second place, any such interference could only have produced confusion and delay, and would have tended to involve his company in liability not contemplated by the contracting parties. It is clear that the danger was not open to common observation, and that the plaintiff's case has no support in the fact that it was foolhardy to run the train on the bridge in its insecure condition. The contractor, acting by his foreman, knew, or ought to have known, the condition of the bridge. He reserved, for his protection, the right to have the signals for the passage of trains given when his foreman, Englesby, so ordered. The signal was given in obedience to Englesby's orders. The bridge was then unsafe, hence the disaster that followed, and for it the contractor, Smith, is alone liable. This case has been argued for the plaintiff very much as if the plaintiff's intestate was a common day-laborer, and, in the simplicity of his nature, trusted to the railroad company for protection. The facts certified warrant no such conclusion, but quite the contrary. In a telegram to Chief Engineer Coe, dated Baltimore, January 13, 1887, Smith says: "Foreman reports James River bridge finished, and he awaiting or-

his gang at Lynchburg. Shall I order them up Ivy Creek at once?" On the next day he says to Coe: "I will send Englesby and gang to Har- if you decide to postpone the trestling as sug- On another occasion he spoke of them as "my Now, considering the character of work in ith was engaged, in connection with the terms spect to his workmen, such as "Englesby and " and "my erectors," the reasonable infer- hat the plaintiff's intestate was one of the e of the erectors—and that they were all nds in the art of bridge erection. It may be general that companies constructing railroads constructing public works, in the performance te duties, have again and again been held ex- liability for the negligence of contractors and ctors or their agents or servants. In addition to ities already referred to in support of this propo- y a few more need be cited.¹ In the last named held : (1) That a railroad company, which had ract the entire work of constructing its road, and atrol over those employed in the work, was not njuries to a third person, occasioned by the negli- of those employed in doing the work, such as n a manner to throw rocks upon the land r. (2) That a party is not chargeable with ent acts of another in doing the work upon unless he stands in the character of em- the one guilty of the negligence, or unless is authorized by him would necessarily produce ies complained of, or they are occasioned nission of some duty incumbent upon him. here is no distinction in this respect between an

¹ *W. Railroad Co.*, 66 N. Y., 182; *Gorham v. Gross*, 125 Mass., *gham v. Railroad Co.*, 51 Tex., 503; *Painter v. Mayor*, etc., r; *Steel v. Railroad Co.*, 16 C. B., 550; *Clark v. Railroad*, 28 ylett *v. Railroad Co.*, Id., 297; *Callahan v. Railroad Co.*, 23 uff *v. Railroad Co.*, 35 N. J. Law, 17; *West v. Railroad Co.*, Tibbets *v. Railroad Co.*, 62 Me., 437; *McCafferty v. Railroad*, 178.

HARVARD LAW LIBRARY

owner of real and of personal property, and the former is held to no stricter liability for the negligent use and management of his real estate, or of negligent acts upon it by others, than is the latter as to a similar use of his property. Such is the true doctrine, and we adopt it as the only doctrine justly applicable to the present and all similar cases. There is, therefore, no just ground upon which the plaintiff in error, the plaintiff below, can base a right of recovery in the present case. We are of opinion that there is no error in the judgment of the Court below. As all other questions raised are dependent upon that raised by the plaintiff's first and most material bill of exceptions, which has been very fully considered, and as the determination thereof on the facts and law of the case will probably operate as a final disposition of the case itself, we deem it unnecessary to consider the questions raised by other exceptions of minor importance. The judgment of the Court below is correct, and must be affirmed.

Judgment affirmed.

LIABILITY OF THE EMPLOYER FOR THE TORTS OF AN INDEPENDENT CONTRACTOR.

I. When an employer has placed the execution of a specified work in the hands of a competent and trustworthy workman, yielding up to him the entire possession and control of the premises where it is to be carried on, and reserving to himself no direction or control over the manner in which it is to be executed, he will generally not be liable to the servants of the contractor, or to a stranger, for any injury which may happen through the negligence or wrongdoing of the contractor or his servants. The rule of *respondent superior* has no application to such a case; for the contractor is in no sense the servant of the employer, except as to the results of the work. The manner of executing it is his own, and cannot be

imputed to the employer; and if that manner of execution produce a faulty result, the employer is not bound to accept it. Until acceptance or ratification of the contractor's acts, then, the employer cannot be held responsible for them. This distinction was formerly doubted; and *Bush v. Steinman*, 1 Bos. & P., 404, ruled that the employer was liable for the negligence of not merely a contractor, but for that of the servant of a sub-sub-contractor. Chief Justice EYRE very naturally had some doubts about it, and declared that he could not state the precise principle on which the action was founded; and his doubts have since been amply justified. Although *Bush v. Steinman* was followed in some early English and

cases, it has long ago
etely cast aside, and the
tated is supported by an
ng weight of authority:
Hooper, 11 Allen (Mass.),
ball v. Cushman, 103
Pack v. N. Y., 8 N. Y.,
erpool v. Coit, 28 Barb.
, Young v. N. Y. Cent.
Barb., 229; Benedict v.
Barb., 288; Van Wert v.
8 How. Pr. (N. Y.), 451;
omas, 13 Hun (N. Y.),
v. Tribune Assn., 30
Wiener v. Hammell, 14
, 365; Meighan v. Hol-
Y. Suppl., 180; Lind-
r Mfg. Co., 4 Mo. App.,
ley v. Chic., S. F. & Cal.
Mo. App., 449; Yerger
7 Casey, 319; Reed v.
79 Pa., 300; Smith v.
03 Pa., 32; E. St. Louis
ll. App., 219; Scammon
5 Ill., 438; West v. St.
H. R. R., 63 Ill., 545;
Ramsden, 83 Ill., 354;
lan, 63 Cal., 269; Pey-
ards, 11 La. An., 62;
S. W. Expos. Assn.,
943; Pawlet v. Rut. &
, 28 Vt., 297; Bailey v.
t. R. R., 57 Vt., 252;
olbrook, 52 N. H., 120;
rlin Mills, 58 N. H.,
Han. & St. J. R. R.,
Kellogg v. Payne, 21
altemeyer v. R. R., 71
R. v. Willis, 38 Kas.,
v. Charleston, 15 Rich.
Holt v. Whatley, 51
yer v. Mid. Pac. R. R.,
litte v. Rep. Val. R. R.
620; N. O. & N. E. R.
r Miss., 581; Pierce v.
Wis., 180; Rome &
v. Chasteen, 88 Ala.,
v. R. R., 39 Ohio St.,
A. & E. R. R. Cas.,

110); Hackett v. West. Un. Tel.
Co., 49 N. W., 822; Haley v. Lum-
ber Co., 51 N. W., 321; Charlebois
v. R. R., 51 N. W., 812; R. R. v.
McConnell, 13 S. E., 828; R. R. v.
Kimberley, 13 S. E., 277; Long v.
Moon, 17 S. W., 810; Duncan v.
Findlater, 6 Cl. & Fin., 894; Rap-
son v. Cubitt, 9 M. & W., 710; Hall
v. Smith, 2 Bing., 156; Alles v. Hay-
ward, 7 Q. B., 960; Knight v. Fox,
5 Exch., 721; Richmond v. Russell,
22 Sc. Jur., 394; Peach v. Rowland,
13 C. B., 182; Gayford v. Nichols,
9 Exch., 702; Holliday v. St. Leon-
ard, 11 C. B. N. S., 192; Gilbert v.
Halpin, 3 Ir. Jur. N. S., 300; Nor-
mile v. Braby, 4 F. & F., 962; In-
nocent v. Peto, 4 F. & F., 8. *A
fortiori* the same rule governs the
case of the liability of the employer
and the contractor for the negli-
gence and torts of a sub-contractor
or his servants: Blake v. Ferris, 5
N. Y., 48; Slater v. Mersereau, 64
N. Y., 138; Wray v. Evans, 80 Pa.,
102; Scarborough v. R. R., 10 So.,
316; Butler v. Hunter, 7 H. & N.,
826; Overton v. Freeman, 11 C. B.,
867; Pearson v. Cox, 2 C. P. Div.,
369.

II. Who is an independent con-
tractor? Many rules have been
laid down for the decision of this
question. It has been said that the
test of an independent contractor is
the right to select, employ and con-
trol the action of the workmen:
Clare v. Nat. City Bank, 40 N. Y.
Super. Ct., 104; Hale v. Johnson, 80
Ill. App., 185; Bennett v. True-
body, 66 Cal., 509. That an inde-
pendent contractor is one who is
subject to the control of his em-
ployer as to the results of his work
only: Knoxville Iron Co. v. Dob-
son, 7 Lea (Tenn.), 367; 2 Thom.
Neg., 899, p. 22. That the test is
whether the employer retains the

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power of directing and controlling the work: *Andrews v. Boedecker*, 17 Ill. App., 213; *Chic. City Ry. v. Hennessey*, 16 Ill. App., 153; *Wilson v. White*, 71 Ga., 506. But these tests are only partial; and the best definition is that given in *Powell v. Va. Constr. Co.*, 88 Tenn., 692: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work." This includes all the others, and adds the additional requisite, that the contractor must be engaged in an independent employment. That this is a necessary qualification is apparent from the fact that most servants are left very much to the freedom of their own will in the performance of their several tasks, and that very many, especially corporate servants, are left to select their workmen. The other rules would narrow the liability of the employer to a very small compass.

In accordance with the rule stated above, any one who follows a recognized independent employment, as that of a slater, *McCarthy v. 2d Parish of Portland*, 71 Maine, 318; a builder, *Robinson v. Webb*, 11 Bush (Ky.), 464; a manufacturer of shingles, *Whitney v. Clifford*, 46 Wis., 138; *State v. Emerson*, 72 Maine, 455; an architect, *Dedford v. State*, 30 Md., 179; a horse-trainer, *Arasmith v. Temple*, 11 Bradw., 39; a plumber, *Meany v. Abbott*, 6 Phila., 256; a licensed drover, *Miligan v. Wedge*, 12 Ad. & El., 737; a licensed public carman, *McMullan v. Hoyt*, 2 Daly (N. Y.), 271; a licensed public drayman, *DeForest v. Wright*, 2 Mich., 368; and a stevedore, *Riley v. Steamship Co.*,

29 La. An., 791; *Burke v. Sugar Ref. Co.*, 11 Hun (N. Y.), 354; *Dwyer v. Steamship Co.*, 17 Blatchf. C. Ct., 472; *The Rheola*, 19 Fed. Rep., 926; *Linton v. Smith*, 8 Gray (Mass.), 147; *Hass v. Steamship Co.*, 88 Pa., 269; *Murray v. Currie*, 6 L. R. C. P., 24; *Blaikie v. Stembridge*, 6 C. B. N. S., 894; is to be regarded as an independent contractor. But a yet broader rule is given in *Hexamer v. Webb*, 101 N. Y., 377: "Where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, without any restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but is an independent contractor." This has much to commend it; and it will go far to reconcile the apparently conflicting cases upon the subject: *Brackett v. Lubke*, 4 Allen (Mass.), 138; *Conners v. Hennessey*, 112 Mass., 96; *Hunt v. Pa. R. R.*, 51 Pa., 475; *Rankin v. Transp. Co.*, 73 Ga., 229; *Fink v. Furnace Co.*, 82 Mo., 276; *Mayhew v. Mining Co.*, 76 Maine, 100; *Dillon v. Sixth Ave. R. R. Co.*, 48 N. Y. Super. Ct., 283; *Schuler v. Hudson R. R. R.*, 38 Barb. (N. Y.), 653; *Corbin v. Am. Mills*, 27 Conn., 274; *Potter v. Seymour*, 4 Bosw. (N. Y.), 140; *Devlin v. Smith*, 89 N. Y., 470; *Darmstaetler v. Moy-*

nahan, 27 Mich., 188; Tiffin v. McCormack, 34 Ohio St., 638; Glickauf v. Maurer, 75 Ill., 289; Morgan v. Bowman, 22 Mo., 538; Detroit v. Corey, 9 Mich., 165; R. R. v. Reese, 61 Miss., 581; Mumby v. Bowden, 6 So., 453; Mill v. Cooper, 30 N. E., 294; Smith v. Belshaw, 26 Pac. 834; McKeon v. Bolton, 1 Ir. C. L. Rep., 377; Sadler v. Henlock, 4 El. & Bl., 570; Johnston v. Hastie, 30 Up. Can. Q. B., 232; Beadleson v. Murray, 8 Ad. & El., 109; Wood v. Cobb, 13 Allen (Mass.), 58; Harrison v. Collins, 86 Pa., 153; Ferguson v. Hubbell, 97 N. Y., 507; Wiggett v. Fox, 11 Exch., 832; Johnson v. Lindsay (1891), App. Cas., 371. The mode of payment, and the fact that materials are furnished by the employer, although entitled to consideration, have but little weight in determining whether or not the employee is an independent contractor: R. R. v. Reese, 61 Miss., 581; Fuller v. Bank, 15 Fed. Rep., 875; Harrison v. Collins, 86 Pa., 153; Mansfield Co. v. McEnery, 91 Pa. 185; R. R. v. Grant, 46 Ga., 417; Hexamer v. Webb, 101 N. Y., 377. It may be added, that if the contractor, by his conduct, induces another to believe that a sub-contractor is his servant, he will be estopped from denying that relation in a suit brought against him for the negligence of the sub-contractor: Johnson v. Owen, 33 Iowa, 512.

It sometimes becomes an important question as to who is responsible for the acts of the general servants of one party who are at the time in the service of another. The general rule is, that where a person is under the entire direction and control of another, he is to be considered as his servant, no matter who pays him: Ditberner v. Rogers,

66 How. Br. (N. Y.), 35; Laugher v. Pointer, 5 B. & C., 560; Quarman v. Burnett, 6 M. & W., 497. It is now fully established that the general servant of one party may become the servant of another for a special service, and while engaged in that service he is to be considered as the servant of the latter: Murphy v. Caralli, 3 H. & C., 461; Murray v. Currie, 6 L. R. C. P., 24; Rourke v. White Moss Colliery Co., 1 C. P. D., 556 (S. C. 2 C. P. D., 205). When a railroad company agrees to furnish its contractors with motive power, and provides them with construction trains, managed by its servants, who are kept on the pay-roll of the company, but who are wholly subject to the control of the contractors, they are to be regarded as the servants of the contractors: Miller v. Minn. & N. W. Ry. Co., 76 Iowa, 655 (S. C. 39, N. W., 188); New Or., Baton Rouge, Vicks. & Mem. R. R. v. Norwood, 62 Miss., 565; Powell v. Va. Constr. Co., 88 Tenn., 692. Contra: Coyle v. Pierrepont, 37 Hun. (N. Y.), 379; Burton v. R. R., 61 Tex., 526. Of course, when a servant of the contractor is injured by the negligence of a servant of the railroad, he can recover against the latter: Young v. N. Y. Cent. R. R., 30 Barb. (N. Y.), 229; Turner v. Gt. Eastern Ry. Co., 33 L. T. N. S., 431.

III. There are two classes of exceptions to the general rule. The first consists of those in which the employer has, by his interference with the operations of the contractor, by directions or otherwise, or by the reservation of powers in the contract, nullified his independence and reduced him to the level of a mere servant. Thus, although, as has been said, the employer is not liable for the independent acts of a

contractor, yet if he actively interferes with or directs the work, in person or by agent, he will be responsible for any injury which may be caused by it: *Lowell v. R. R.*, 23 Pick. (Mass.), 24; *Linnahan v. Rollins*, 137 Mass., 123; *Erie v. Caulkins*, 85 Pa., 247; *Ardesco Oil Co. v. Gilson*, 63 Pa., 146; *Nevins v. Peoria*, 41 Ill., 502; *Palmer v. Lincoln*, 5 Neb., 136; *Samyn v. McCloskey*, 2 Ohio St., 536; *Campbell v. Lunsford*, 3 So., 522; *Chic. K. & West. R. R. v. Watkins*, 43 Kans., 50; *Hefferman v. Benkard*, 1 Robt. (N. Y.), 432; *Gourdier v. Cormack*, 2 E. D. Smith (N. Y.), 254; *Lacour v. N. Y.*, 3 Duer (N. Y.), 406; *Jones v. Liverpool*, 14 Q. B. D., 890; *Murphy v. Ottawa*, 13 Ont. 334; *Jones v. Chantry*, 4 T. & C. (N. Y.), 63; *Johnston v. Hastie*, 30 Up. Can. Q. B., 232; *Mumby v. Bowden*, 6 So., 453. The rule of the civil law is the same: *Sérandat v. Saisse*, 1 L. R. P. C., 152, and authorities there cited. It must be shown, however, that the directions or interference of the employer, not the negligence of the contractor or his servants, was the cause of the injury. *Palmer v. Lincoln*, 5 Neb., 136; *Callahan v. Burl. & Miss. R. R.*, 23 Iowa, 562.

The employer is also liable, if the contract reserves to him such a power of supervision or control of the work as will destroy the free agency of the contractor, whether this supervision be exercised by himself, or by persons designated by him: *Pack v. N. Y.*, 8 N. Y., 222; *Kelly v. N. Y.*, 11 N. Y., 432; *Vogel v. Mayor*, 92 N. Y., 10; *Hughes v. R. R.*, 39 Ohio St., 466; *Allen v. Willard*, 57 Pa., 374; *Erie v. Caulkins*, 85 Pa., 274; *School Dist. v. Fuess*, 98 Pa., 600; *Edmundson v. R. R.*, 111 Pa., 316; *McMasters*

v. R. R., 3 Pitts., 1; *Gas Co. v. Wilkinson*, 1 Cent. Rep., 637; *R. R. v. Hanning*, 15 Wall, 649; *Cincinnati v. Stone*, 5 Ohio St., 38; *Harper v. Milwaukee*, 30 Wis., 365; *Chambers v. Co.*, 1 Dis. (Ohio), 327; *Hannon v. County of St. Louis*, 62 Mo., 313; *Chicago v. Joney*, 60 Ill., 383; *Chicago v. Dermody*, 61 Ill., 431; *Hart v. Ryan*, 6 N. Y. Suppl., 921; *Camp v. Church Wardens*, 7 La. Ann., 321; *Denver v. Rhodes*, 9 Col., 554; *Seattle v. Busby*, 3 Pac., 180; *Faren v. Sellers*, 3 So., 363; *Burgess v. Gray*, 1 C. B., 578; *Blake v. Thirst*, 2 H. & C., 20; *Brown v. Co.*, 3 H. & C., 511; *Sack v. Ford*, 13 C. B. N. S., 90; *Dalton v. Bachelor*, 1 F. & F., 15 & 17; *Stephen v. Com'r's*, 3 Ct. of Sess., Cas. 4th Ser., 535; *Steel v. R. R.*, 16 C. B., 550; *Schwartz v. Gilmore*, 45 Ill., 455. When a contract provides that all work shall be done under the direction and constant supervision of the engineer of the railroad, and the damage complained of was caused by excavations outside of the right of way, which the engineer could have prevented, the railroad is liable: *Bechnel v. N. O., Mob. & Tex. R. R.*, 28 La. Ann., 522. When a railroad keeps possession of its road for the purpose of running trains and conveying passengers, it is bound to see that its track is guarded against obstructions, and is liable for any injury caused by an obstruction made by the servants of a contractor: *Va. Cent. R. R. v. Sanger*, 15 Gratt. (Va.), 230. An undertaking by the employer to furnish necessary material will make him liable for an injury due to his failure to provide it: *Gilbert v. Beach*, 5 Bosw. (N. Y.), 447. When a mining company, entering into a contract for work to be done in its mine, reserves the right to make

ements as shall be ne-
protect the workmen, it
le for all injuries that
to their contributory
Lake Sup. Iron Co. v.
9 Mich., 492; Kelly v.
Ohio St., 438.

Employer will not be li-
power of supervision
not such as to interfere
cretion of the contrac-
anner of executing the
confined to seeing that
d result is produced:
Georgia, 41 Ill., 502; Gard-
ett, 38 N. Y. Super. Ct.,
nes Water Sup. Co. v.
Ind., 376; Robinson v.
ash. (Ky.), 464; Clare v.
Super. Ct., 104. If the
asted with the supervis-
ork fails to see that it
performed, his employer
charged with his breach
ambers v. Ohio L. I. &
a. (Ohio), 327. The fact
mployer has specified the
be used does not make
o one injured by a ma-
the contractor has pro-
is own benefit: Chic.
Hennessey, 16 Ill. App.,
the employer reserves
nnul the contract, if the
do not employ men and
the satisfaction of the
er, it does not neces-
the contractor the ser-
employer: Burmeister
R. R., 47 N. Y., Super.
provision in the con-
chief-engineer of the
ould supervise the work,
have power to direct
ge of any laborer em-
e contractors who is in
incompetent, does not
with the freedom of the
as to make them the

servants of the company: McKin-
ley v. Chic S. F. & Cal. R. R., 40
Mo. App., 449; Rogers v. Florence
R. R., 9 S. E., 1059; Blumb v. Kan-
sas, 84 Mo., 112; Clark v. R. R., 36
Mo., 202; Eaton v. R. R., 59 Me.,
520.

The employer will also be liable
for an injury caused by a defect in
the contract work, after it has been
finished by the contractor and ac-
cepted by him; but it would seem
to be the better opinion that the
employer must first have either had
actual notice of the defect, or the
facts must be such as to charge him
with constructive notice: Gorham
v. Gross, 125 Mass., 232; Sturges v.
Theol. Soc., 130 Mass., 414; Khron
v. Brock, 144 Mass., 516; Congreve
v. Smith, 18 N. Y., 79; Devlin v.
Smith, 89 N. Y., 470; Vogel v.
Mayor, 92 N. Y., 10; Turner v.
Newburgh, 16 N. E., 344; Bast v.
Leonard, 15 Minn., 304; Scarbrough
v. R. R., 10 So., 316; Chartiers Gas
Co. v. Lynch, 118 Pa., 362; Char-
tiers Gas Co. v. Waters, 123 Pa.,
220; Congreve v. Morgan, 5 Duer
(N. Y.), 495; Boswell v. Laird, 8
Cal., 469; Fanjoy v. Seales, 29 Cal.,
243; Cunningham v. R. R., 51 Tex.,
503; Union Pac. R. R., v. Hause, 1
Wyo., 27; St. L., S. F. & West. R.
R., v. Willis, 16 Pac., 728; Ruck v.
Williams, 3 H. & N., 306; Grote v.
R. R., 2 Exch., 251; Searle v. Lave-
rick, 9 L. R. Q. B., 122; Kansas
City R. R. v. Fitzsimmons, 18 Kans.,
34; Albany v. Cudliff, 2 Comstock
(N. Y.), 174; Carey v. Courcelle, 17
La. Ann., 108. The employer will
also be liable for the tortious acts
of a contractor, if he ratifies them:
Parker v. Waycross & Fla. R. R.,
81 Ga., 387; Coomes v. Houghton,
102 Mass., 211.

IV. The second class of excep-
tions to the general rule are those

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in which the employer, while leaving the contractor to the full exercise of his own discretion in the execution of the contract work, has nevertheless made the act complained of his own, either by directly authorizing it, by entering into a contract which would necessarily lead to it, by assuming a duty, or by neglecting one that is cast upon him by the law. His liability in these cases does not depend upon the doctrine of *respondeat superior*. He is liable, not as the master of the contractor, but as a joint *tort-feasor* with him. Accordingly, the employer will be held liable if the injurious act complained of was contemplated by the contract: *Whitney v. Clifford*, 46 Wis., 138; *R. R. v. Board*, 33 L. J. M. C., 174; *Leber v. Minn. & N. W. R. R.*, 29 Minn., 156; *Hamilton v. Fond du Lac*, 40 Wis., 47; *R. R. v. Drennan*, 26 Ill., App., 263. If the contract work is necessarily dangerous or harmful: *Mayor v. McCary*, 84 Ala., 469; *Cuff v. Newark & N. Y. R. R.*, 35 N. J. L., 17; *Wilson v. Wheeling*, 19 W. Va., 323; *Circleville v. Neuding*, 41 Ohio St., 465; *Dooley v. Sullivan*, 14 N. E., 566; *Haniford v. Kansas*, 103 Mo., 172; *Bailey v. Troy & Bost. R. R.*, 57 Vt., 252; *Ryland v. Fletcher*, 3 L. R. H. L., 330. In one case, however, it was held that the erection of a building adjacent to a highway, with the usual and necessary excavations, and consequent obstruction to sidewalk and street, was not such an inherently dangerous work as to make the owner of the premises liable: *Moline v. McKinnie*, 30 Ill. App., 419. He will also be liable if the injury is the necessary result of the work contracted for, but not if it be merely collateral to the contract, and be due solely to the negligence of the

contractor or his servants: *Hawthurst v. N. Y.*, 43 Hun. (N. Y.), 588; *McDonell v. Rifle Boom Co.*, 38 N. W., 681; *Vanderpool v. Husson*, 28 Barb. (N. Y.), 196; *Broadwell v. Kansas*, 75 Mo., 213; *Williamson v. Fisher*, 50 Mo., 198; *Lockwood v. Mayor*, 2 Hilt. (N. Y.), 66; *Palmer v. Lincoln*, 5 Neb., 136; *Sewall v. St. Paul*, 20 Minn., 511; *Lacour v. Mayor*, 3 Duer (N. Y.), 406; *Baxter v. Warner*, 6 Hun. (N. Y.), 585; *Booth v. R. R.*, 17 N. Y. Suppl., 336; *Pitts v. Highway Board*, 19 W. R., 884; *Hilliard v. Richardson*, 3 Gray (Mass.), 349; *Eno v. Del Vecchio*, 6 Duer (N. Y.), 17; *King v. Livermore*, 9 Hun. (N. Y.), 298; *McCafferty v. R. R.*, 61 N. Y., 178; *Earl v. Beadleston*, 42 N. Y. Super. Ct., 294; *Herrington v. Lansingburgh* 110 N. Y., 147; *Carman v. R. R.*, 4 Ohio St., 399; *Tiffin v. McCormack*, 34 Ohio St., 638; *Joliet v. Harwood*, 86 Ill., 110; *Tibbetts v. R. R.*, 62 Maine, 437; *Davie v. Levy*, 2 So., 395; *Water Co. v. Ware*, 16 Wall., 566; *Hackett v. West Un. Tel. Co.*, 49 N. W., 822. When work is *per se* dangerous and the employer does not stipulate that the contractor shall use proper precautions to avoid injury to others, the employer is liable: *Matheny v. Wolffs*, 2 Duv. (Ky.), 137. Thus, when a builder contracts to put a new roof on a building, but the contract does not bind him to protect the property of the tenants from the weather, the owner of the building is liable for his negligence in leaving the roof uncovered, so that rain came through and damaged the tenant's goods: *Sulzbacher v. Dickie*, 6 Daly (N. Y.), 469.

When the work contracted for becomes or occasions a nuisance in the course of its execution, the employer is liable, if it be not due to

the sole negligence of the contractor. This is the only satisfactory rule that can be deduced from the multitude of conflicting cases. *Fuller v. Bank*, 15 Fed. Rep., 875; *Storrs v. Utica*, 17 N. Y., 104; *Brusso v. Buffalo*, 90 N. Y., 679; *Hilliard v. Richardson*, 3 Gray (Mass.), 349; *Allen v. Willard*, 57 Pa., 374; *Reed v. Allegheny*, 79 Pa., 300; *Smith v. Simmons*, 103 Pa., 32; *Erie v. Caulkins*, 85 Pa., 247; *Conners v. Hennessey*, 112 Mass., 96; *Edmundson v. R. R.*, 111 Pa., 316; *Homan v. Stanley*, 66 Pa., 464; *Creed v. Hartman*, 29 N. Y., 591; *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.), 629; *Ryan v. Curran*, 64 Ind., 345; *Wood v. School Dist.*, 44 Iowa, 27; *Kep- perly v. Ramsden*, 83 Ill., 354; *Pfau v. Williamson*, 63 Ill., 16; *R. R. v. Farver*, 111 Ind., 195; *Rob- inson v. Webb*, 11 Bush. (Ky.), 464; *Clark v. Fry*, 8 Ohio St., 358; *O'Rourke v. Hart.*, 7 Bosw. (N. Y.), 511; *Robbins v. Chicago*, 4 Wall., 657 (aff. S. C., 2 Black, 418); *Pet- tengill v. Yonkers*, 116 N. Y., 558; *Walker v. MacMillan*, 6 Can. S. C. R., 241; *Knight v. Fox*, 5 Exch., 721; *Overton v. Freeman*, 11 C. B., 867; *Peachey v. Rowland*, 13 C. B., 182; *Hole v. R. R.*, 6 H. & N., 488; *Taylor v. Greenhalge*, 9 L. R. Q. B., 487. A municipal corpora- tion, however, cannot exonerate itself from liability for injuries caused by a dangerous condition of its streets and highways, by showing that that condition was due to the negligence of a contractor em- ployed by it. It is still obliged to see that the streets are in a safe condition for travel: *Schweick- hardt v. St. Louis*, 2 Mo. App., 571; *Kemper v. Louisville*, 14 Bush (Ky.), 87; *Memphis v. Lasser*, 9 Humph. (Tenn.), 760; *Mayor v.*

O'Donnell, 53 Md., 110; *Grant v. Brooklyn*, 41 Barb. (N. Y.), 381; *Springfield v. LeClaire*, 49 Ill., 476; *Mayor v. Brown*, 9 Heisk., 1; *Mayor v. Waldron*, 49 Ga., 316. *Contra*: *Pack v. N. Y.*, 8 N. Y., 222; *Kelly v. N. Y.*, 11 N. Y., 432; *Wood v. Watertown*, 11 N. Y. Suppl., 864; *Painter v. Pittsburgh*, 46 Pa., 213. It makes no difference that, by the contract, the contractor has stipu- lated to be responsible for all damages that may be caused in the execution of the work: *Veazie v. R. R.*, 49 Maine, 119; *Pettengill v. Yonkers*, 116 N. Y., 558; *McAllister v. Al- bany*, 18 Oreg., 426; *Smith v. St. Joseph*, 42 Mo. App., 392. *Contra*: *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.), 629. Of course, when the employer has himself assumed a personal responsibility for damage, he will be liable for the acts of the contractor: *Water Co. v. Ware*, 16 Wall, 566.

The owner of ground will be lia- ble to the adjacent owner for an injury to his right of lateral sup- port, caused by a contractor who makes an excavation thereon: *Brown v. Werner*, 40 Md., 15; *Stevenson v. Wallace*, 27 Gratt. (Va.), 77; *Bowers v. Peate*, 1 Q. B. D., 321; *Lemaitre v. Davis*, 19 Ch. D., 281; *Dalton v. Angus*, 6 App. Cas., 740. *Contra*: *Harrison v. Kiser*, 4 S. E., 320; *Myer v. Hobbs*, 57 Ala., 175. But the right must first be affirmatively shown: *Gayford v. Nichols*, 9 Exch., 702.

When the injury complained of arises out of the exercise by the contractor of powers derived from the charter of his employer—powers which he would have no right to exercise except under such author- ity—the employer is liable. This is based upon the double ground that such acts can only be done in pur-

suance of the direction of the employer, and that the State having granted these powers to the employer, charges it with the duty of seeing that they are properly exercised: *Lasher v. Wab. Nav. Co.*, 14 Ill., 85; *Hinde v. Wab. Nav. Co.*, 15 Ill., 72; *Chic. St. P. & Fond du Lac R. R. v. McCarthy*, 20 Ill., 385; Ill. Cent. R. R. v. *Finnigan*, 21 Ill., 646; *Chic. & Rock I. R. R. v. Whipple*, 22 Ill., 105; *West v. St. L., V. & T. H. R. R.*, 63 Ill., 545; *Vt. Cent. R. R. v. Baxter*, 22 Vt., 365. *Contra*: *Clark v. Vt. & Can. R. R.*, 28 Vt., 103.

When the act that causes the injury is done without proper authority, or in violation of an ordinance or statute, the employer will be liable for the negligence of the contractor: *Walker v. McMillan*, 6 Can. S. C. Rep., 241; *Lawrence v. Shipman*, 39 Conn., 586; *Baxter v. Warner*, 6 Hun. (N. Y.), 585; *Ullman v. Han. & St. J. R. R.*, 67 Mo., 118; *Cairo & St. L. R. R. v. Woolsey*, 85 Ill., 370; *Rockf. Rock I. & St. L. R. R. v. Wells*, 66 Ill., 321; *Brown v. McLeish*, 71 Iowa, 381; *Doran v. Flood*, 47 Fed., 543.

When the employer undertakes the duty of providing machinery for the contractor, he is bound to see that it is safe and sufficient to perform the work; and if it is not, and he either knew or might have known of its insufficiency, he will be liable for any injury caused thereby to an employee of the contractor, or to a third person: *The Rheola*, 19 Fed. Rep., 926; *Milchey v. Rel. Soc.*, 125 Mass., 487; *Conlon v. R. R.*, 135 Mass., 195; *Riley v. Steamship Co.*, 29 La. Ann., 791; *Coughtry v. Globe Co.*, 56 N. Y., 124; *Larock v. Ogdensburgh & Lake Ch. R. R.*, 26 Hun. (N. Y.), 382; *Horner v. Nicholson*, 56 Mo.,

220; *Samuelson v. Cleveland Iron Co.*, 49 Mich., 164; *Johnson v. Spear*, 76 Mich., 139; *Whitney v. Clifford*, 46 Wis., 138 (S. C. 47 N. W., 835); *Heaven v. Pender*, 11 Q. B. D., 503. *Contra*: *Burke v. Sugar Ref. Co.*, 11 Hun. (N. Y.), 354. When, however, the employer is under no duty to furnish the machinery or appliances, but merely permits the contractor to use them, he will not be liable: *Barrett v. Singer Mfg. Co.*, 1 Sweeny (N. Y.), 545. And where the machinery becomes defective in the contractor's hands, the employer will not be responsible: *King v. R. R.*, 66 N. Y., 181.

V. In general, the employer will be liable for the negligence of the contractor whenever there is a duty resting upon him in regard to the subject-matter of the contract, either to the public or to individuals: *Wyman v. R. R.*, 46 Maine, 162; *Veazie v. R. R.*, 49 Maine, 119; *Mayhew v. Mining Co.*, 76 Maine, 100; *Fink v. St. Louis*, 71 Mo., 52; *Speed v. Atl. & Pac. R. R.*, 71 Mo., 303; *P. W. & B. R. R. v. Hahn*, 12 Atl., 479; *Silvers v. Nerdlinger*, 30 Ind., 53; *Sessengut v. Posey*, 67 Ind., 408; *Allison v. R. R.*, 64 N. C., 382; *Wilkinson v. Detroit Works*, 73 Mich., 405; *Pettengill v. Yonkers*, 116 N. Y., 558; *Turnpike v. Buffalo*, 1 T. & C. (N. Y.), 537; *Matthews v. West Lond. Water Works*, 3 Cam., 403; *Sly v. Edgley*, 6 Esp., 6; *Brazier v. Inst.*, 1 F. & F., 507; *Pendlebury v. Greenhalge*, 1 Q. B. D., 36; *Bauer v. Rochester*, 12 N. Y. Suppl., 418 (S. C. 59 Hun., 616); *Dressell v. Kingston*, 32 Hun., 533; *Groves v. Rochester*, 39 Hun., 5; *Delmonico v. N. Y.*, 1 Sandf. Super Ct., 222; *Logansport v. Dick*, 70 Ind., 65; and when a municipal corporation expressly

ay all damages caused
 struction of a public
 of course, liable: Leeds
 l, 102 Ind., 372. This
 be delegated to a cons-
 s to exonerate the em-
 all responsibility for
 ce of the latter: Storrs
 N. Y., 104; Congreve
 8 N. Y., 79; Brusso v.
 N. Y., 679; Gorham v.
 lass., 232; Welsh v. St.
 o., 71; Russell v. Co-
 Mo., 480; Canal Co. v.
 Pa., 290; Homan v.
 Pa., 464; Impr. Co. v.
 5 Pa., 377; Trainor v.
 a., 148; Clark v. Fry,
 359; Houston & G. N.
 Meador, 50 Tex., 77;
 Gas Light Co., 40
), 380; Mayor v. Mc-
 , 469; Jacksonville v.
 la., 106; Jefferson v.
 27 Ill., 438; Springfield
 49 Ill., 476; Mayor v.
 Ga., 316; Nashville v.
 eisk. (Tenn.), 1; Lan-
 nn. Mut. Life Ins. Co.,
 Francis v. Cockrell, 5
 501; Tarry v. Ashton,
 14; Stephen v. Com'r's,
 s. Cas., 4th Ser., 535;
 Percival, 8 App. Cas.,
 v. McConnell, 13 S. E.,
 still an open question
 statutory requirement
 ct shall be given to the
 er exonerates the em-
 Detroit v. Corey, 9
 CAMPBELL, J., in a dis-
 sion, argued that the
 ne provision was mani-
 ent the city from hav-

ing its own employees; but the
 majority opinion did not touch this
 point. In James v. San Francisco,
 6 Cal., 528, it was decided that in
 such a case the municipal corpora-
 tion was not liable; but in Mahanoy
 Township v. Scholly, 84 Pa., 136, it
 was ruled that such a requirement
 did not affect the liability of the
 township. The latter would seem
 to be the correct ruling; for, as has
 been said, the liability of the em-
 ployer in such a case does not de-
 pend upon the rule of *respondeat
 superior*, but upon the duty of the
 municipal corporation to see that
 its streets are in safe condition for
 travel. And where there is no such
 duty, it would not be liable, whether
 it was obliged to let the contract to
 a certain person, or had full power
 of selection.

Finally, this rule, which forbids
 the delegation of duty, applies with
 peculiar force to those duties which
 are imposed by statute, or by char-
 ter. In the latter case, particularly,
 these duties stand in the place of a
 consideration paid for the charter
 grants, and the grantee cannot, in
 any way, evade his responsibility:
 Holden v. Rutland & Burl. R. R.,
 30 Vt., 297; Wyman v. R. R., 46
 Maine, 162; Huey v. Ind. & Vinc.
 R. R., 45 Ind., 320; Pound v. Port
 Huron & S. W. R. R., 54 Mich.,
 13; Rockf. Rock I. & St. L. R. R.
 v. Heflin, 65 Ill., 366; R. R. v.
 Hahn, 12 Atl., 479; Hole v. R. R.,
 6 H. & N., 488; Gray v. Pullen, 5
 B. & S., 970; Lowell v. R. R., 23
 Pick (Mass.), 24; Dorrity v. Rapp,
 72 N. Y., 307.

ARDEMUS STEWART.

ing to the length of the case reported in this number, the Editors were
 the "Editorial Notes."

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BOOK REVIEWS.

PLEADING AT COMMON LAW AND UNDER THE CODES. [Reprinted from the American and English Encyclopædia of Law.] By GEORGE WHARTON PEPPER, Fellow of the Department of Law, University of Pennsylvania. The Edward Thompson Co., Northport, L. I., 1891.

This excellent treatise opens with a concise historical review of pleading in England, from the earliest times till the present day. This is followed by an account of the course of pleading in this country, indicating how far the several States have adhered to or departed from the present system. The writer then discusses the essential features of code pleading. These topics take up one-third of the book. The remaining two-thirds are given to a detailed examination of the system of pleading at common law.

It is obvious, from this distribution of the subject-matter, which seems to us judicious, that the treatise is addressed chiefly to the student of law. With some reserve as to the praise bestowed upon code pleading in its present condition, we agree with the following remarks, in which the writer has clearly defined his own views in regard to pleading: "The whole system of code pleading is the protest of an era of practical business-like methods against the refinements and subtleties of an earlier age. If the pleader could be trained under the old system, in accuracy of thought and expression, and then made to practice under the new, code pleading would be found to be an ideal system. But it is clear, that, as a system, code pleading has not the educational value which belongs to pleading at common law, and it may be doubted whether the average practitioner, with no other training than that which the letter of the code supplies, is competent to do this system justice."

The book is as good in execution as in plan. The writer has not, it is true, addressed himself to the extremely difficult task of throwing the light of original historical research into the many dark corners of the subject; but he has read with great intelligence everything of value written by his predecessors, and has stated his

conclusions in a style admirably clear and terse. He has convictions, too, which he has not hesitated to express. The discussion of dilatory pleas, on page 53, and the explanation of *Reynolds v. Blackburn*, on page 95, are good illustrations of the author's critical faculty, which, in general, seems to be sound. In one instance, however, he strikes wide of the mark. On page 65 he finds an antagonism between *Gibbons v. Pepper* and *Hall v. Fearnley*, and ascribes it to a fallacious distinction. But these cases seem rather to confirm each other. In the former case, where the horse bearing the defendant became frightened and unmanageable and ran over the plaintiff, "not guilty" was the proper plea, because the horse, and not the defendant, was the actor. In the other case, where the defendant drove a cab over the plaintiff, who carelessly put himself in front of the vehicle, the defendant was the actor, although an excusable actor. His defence was, therefore, to be taken by a plea in confession and avoidance.

For reference, and as an aid to the student who is grappling with the cases on common law pleading, this book cannot fail to be of great value, and will doubtless rank with the best of the monographs in the very useful Encyclopædia of which it forms a part. J. B. A.

BOOKS RECEIVED.

- STORY'S EQUITY PLEADINGS. Tenth Edition. Revised, Corrected and Enlarged. By JOHN M. GOULD, Ph.D. Boston: Little, Brown & Co.
- A TREATISE ON THE LAW OF INSURANCE: FIRE, LIFE, ACCIDENT AND MARINE, with a selection of Leading Illustrative Cases and an Appendix of Statutes and Forms. By GEORGE RICHARDS. New York and Albany: Banks & Brothers, 1892.
- COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By CHARLES FISK BEACH, Jr. Two volumes. Chicago: T. H. Flood & Co., 1891.
- DIGEST OF INSURANCE CASES FOR 1891. By JOHN A. FINCH. Indianapolis: The Rough Notes Company, 1892.
- IL DIRITTO COMUNE, per O. W. HOLMES, JR. Translated by FRANCESCO LAMBERTENGHI. Sondrio: Tipografia A. Moro e C.
- THE FEDERAL POWER OVER COMMERCE AND ITS EFFECT ON STATE ACTION. By WILLIAM DRAPER LEWIS, Ph.D. Philadelphia: University of Pennsylvania Press, 1892.
- CORPORATIONS IN PENNSYLVANIA. By WALTER MURPHY. Two volumes. Philadelphia, 1891. Rees, Welsh & Co.

CRITICISMS ON RECENT DECISIONS.

A NEW CRITERION OF CONTRACT.

BY R. C. MCMURTRIE, Esq.

AN answer to an inquiry for rate of transportation makes a contract complete on delivery of the goods to the carrier, so that the actual contract then made by the acceptance of the bill of lading is a nullity, and the contract remains as if the carrier had accepted the goods in silence.

This is the decision of the highest Court of the greatest commercial State of the Union. *Jennings v. Grand Trunk R. R.*, New York Court of Appeals, 30 Am. Law Reg., 638.

The necessary corollary, nay, the direct decision is, that the exclusion of perils of the sea, or fire, or acts of the public enemy, is impossible, if *rates* have previously been given in reply to an inquiry. Apply this to policies of insurance—life or fire—to sales of merchandise, to contracts for hire !

Plainly, if such a piece of folly requires analysis for exposure it lies here : There was no contract until acceptance by the carrier. No one is bound to sell because he has named a price at which he sells. The contract made when the goods were delivered would have included the inference of a contract on the proposed terms, had not such an inference been excluded by annexing the substituted contract ; and if it was not intended that the substituted contract should have such an operation, it was the duty of the shipper to demand acceptance on the naked promise to carry for a certain rate. If the New York rule were the correct canon for construing conduct and words, it undoubtedly follows that there was no right to a bill of lading or a receipt, or any acknowledgment. If that document was a right, it was because the intention to act on the usual terms of shippers and carriers was implied in the making of the rate. In truth, there was no contract at all, but for a rate—and that conditioned upon the delivery and acceptance of the goods. To force a carrier into a contract to carry when there was no correlative obligation to ship, is inconsistent with accuracy. Common sense, it may be said, implies such an obligation ; but, if implied at all, surely it must be upon the customary terms of bills of lading and other similar documents.

If A asks B the rate for cotton or sugar, will anyone contend that by naming a rate, B is bound to sell whatever A demands—it may be ten times what he has got ? A man cannot but be amazed that anything so elementary has been overlooked as what does constitute a contract.

ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions:

BY

WILLIAM WHARTON SMITH, HORACE L. CHEVNEY,
HENRY N. SMALTZ, FRANCIS COPE HARTSHORNE,
JOHN A. MCCARTHY.

ADMIRALTY—CONTRIBUTORY NEGLIGENCE—RES ADJUDICATA—COMMON LAW JUDGMENT.—A judgment in favor of the defendant, in an action at law against the owner of a vessel, does not operate as a bar to a subsequent proceeding in admiralty against the vessel, unless it appears that the judgment was based, not upon the contributory negligence of the plaintiff, but upon the absence of fault upon the part of the defendant: *City of Rome*, District Court of the United States, Southern District of New York, November 21, 1891, BROWN, J. (49 Fed. Rep., 392.)—*H. L. C.*

ADMIRALTY—MARITIME LIEN—INSURANCE PREMIUMS.—Under the general maritime law no lien exists upon a vessel for the amount of premiums due upon a policy of marine insurance issued to the owner of such vessel: *The Hope*, District Court of the United States, District of Washington, February 11, 1892, HANFORD, J. (49 Fed. Rep., 279.)—*H. L. C.*

BANK—INSOLVENCY—SET-OFF—DEPOSITOR.—In a suit by the receiver of an insolvent national bank against the endorser of a promissory note, held by the bank and maturing after the insolvency thereof, the defendant may set-off the amount of his deposit in the bank at the time of its insolvency: *Yardley v. Clothier*, Circuit Court of United States, Eastern District of Pennsylvania, January 5, 1892, BUTLER, J. (49 Fed. Rep., 337.)—*H. L. C.*

BANK—INSOLVENCY OF DEPOSITOR—SET-OFF.—In a suit against a bank, by the assignee of an insolvent, to recover the amount of a deposit of the insolvent, the bank may set-off the amount of a note held by them, upon which the insolvent is liable, but which was not due at the time of the insolvency: *Nashville Trust Company v. Fourth National Bank*, Supreme Court of Tennessee, March 8, 1882, PITTS, J. (18 S. W. Rep., 822.)—*H. L. C.*

CARRIERS—LIEN FOR FREIGHT—MISTAKE IN CHARGE.—A railroad company had hung in its freight office a tariff-sheet of freight rates for the information of shippers. None of the employees had authority to give any rates other than those contained in the tariff-sheet. A shipper asked the freight cashier, in the company's freight office in W., the rate of freight to B.; the cashier did not know, nor was it his duty to know, the rate, and asked the way-bill clerk, upon whom such duty devolved. On account of noise caused by trains, the question was misunderstood, and the clerk erroneously gave the rate of freight to M. This the shipper paid, and requested shipment of his goods to B. Shortly afterward the

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error was discovered, and as the shipper could not be found, the goods were forwarded to B., with instructions to the agent at B. to hold them for additional charges based on the correct rate, which was fair and reasonable. Payment of the additional rate was refused, and upon suit brought against the railroad company for conversion of the goods. Held: That there was no contract of shipment, as there was no meeting of the minds of the parties on account of the misunderstanding, and the defendant was entitled to hold the goods until it received its reasonable charge for transportation: *Rowland v. New York, N. H. & H. R. Co.*, Supreme Court of Errors of Connecticut, August 5, 1891, per TORRENCE, J. (23 Atl. Rep., 755).—*H. N. S.*

CONSTITUTIONAL LAW—ASSESSMENTS FOR LOCAL IMPROVEMENTS AGAINST PROPERTY BENEFITED—JUDGMENTS AGAINST OWNERS OF.—An ordinance of Raleigh provided for the assessments to meet the expense of local improvements upon abutting properties, and that personal judgments could be rendered against the property owners. Held: That the assessments were a valid exercise of the taxing power; but that allowing a personal judgment against the property owner, subjected property not benefited by the improvements to be taken and violated the prohibition against taking property without compensation: *Raleigh v. Peall*, Supreme Court of North Carolina, February 16, 1892, *SHEPERD, J.*; *MERRIMON, C. J.* and *DAVIS, J.*, dissenting as to first proposition (14 Southeastern Rep., 521).—*W. W. S.*

CONSTITUTIONAL LAW—STATE TAXATION—OBLIGATION OF CONTRACTS.—The fact that a city sells to a street railway, for a large sum of money, the franchise to run street-cars, does not prevent the city, in the absence of an express stipulation, from subsequently taxing the company in the form of a gross sum, for a license to run cars: *New Orleans City Cab Co. v. New Orleans*, February 29, 1892; Mr. Justice GRAY (143 U. S., 193).—*W. D. L.*

CORPORATIONS—OFFICERS OF—WHEN THEIR KNOWLEDGE IS THE KNOWLEDGE OF THE CORPORATION—PROMISSORY NOTE.—Plaintiff, a bank and an endorsee, sued on a promissory note, as to which defendant, the maker, had a good defence as against the payee. The person presenting the note was vice-president, a director and member of the discounting committee of the plaintiff, president of the payee, and knew of the defence on the note. Held: That his knowledge was not the knowledge of the bank, as it did not appear that he acted for the bank in the transaction: *Commercial Bank of Danville v. Burgoyne*, Supreme Court of North Carolina, *SHEPERD, J.*, February 23, 1892 (14 Southeast. Rep., 623).—*W. W. S.*

CORPORATION—ULTRA VIRES ACT—ESTOPPEL.—The maker of a note, given to a corporation for money loaned, is estopped from setting up that the corporation had no power to make the loan: *Bond v. Turrell Cotton Company*, Supreme Court of Texas, November 21, 1891; *TARLTON, J.* (18 Southwest. Rep., 691).—*H. L. C.*

AL LAW—ILLEGAL SALE OF INTOXICATING LIQUOR—EVI-SALE—SUFFICIENCY.—In a trial on an indictment for the of intoxicating liquor, a witness for the State testified to les by the defendant, but could not fix the date of any sale. refused to compel counsel for the State to elect on which par-e would demand a conviction. Held : That this was not error : State, Supreme Court of Georgia, per Curiam, January 11, theast. Rep., 570).—*W. W. S.*

ION OF STREETS.—The use of a private street by the public ars, without objection on the part of the owner of the fee, is show a dedication : *Mason v. Sioux Falls*, Supreme Court of a, April 5, 1892 (CORSON, J., 51 Northwestern Reporter, 770).

ATIONAL LAW—MARITIME SEIZURES—WRIT OF PROHIBI- time when a diplomatic correspondence was going on between States and Great Britain, respecting the extent of the jurisdic- former in the waters of Behring Sea, a libel in admiralty was District Court of Alaska, alleging a seizure by the United rities of a vessel "within the limits of Alaska Territory, and s thereof and within the civil and judicial District of Alaska," ce of killing fur seals, in violation of Section 1956, Revised The seizure was effected fifty-nine miles from land. After nation of the vessel, the owner applied to the Supreme Court d States for a writ of prohibition to prevent the Alaska Court ing its sentence. Leave was granted to file the petition, but held, that prohibition will not issue after judgment and less want of jurisdiction appears on the face of the pro- though, before judgment, the Superior Court can examine not cess and pleadings technically of record, but also the facts e upon which action was taken ; and since, in this case, the ated that the seizure was effected "within the limits of the waters thereof," and hence within the jurisdiction of the rt, the Supreme Court could not go behind the record to y facts which might operate to render the seizure illegal violation of international law. Held, also, that the writ of might, in this case, be rightly refused, because to grant it review the action of the political department of the govern- a question pending between it and a foreign power, and to hether the government was right or wrong while negotiations ing on : *In re Cooper*, Chief Justice FULLER, February 29, S., 472).—*R. D.*

OUS PROSECUTION—PROBABLE CAUSE—EVIDENCE. — Iron to a vendee with the understanding that the iron was not to from the cars until paid for. Through an error, the iron was the railroad before it was paid for, and was used by the allowed the owners of the iron and their agent to remain in the fact that the iron was no longer on the cars. Vendees

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repeatedly promised to pay for the iron, but never did so. When at last the owners of the iron learned that the vendees had used it, they caused their arrest for fraudulently contracting a debt. In an action brought by the vendees for malicious prosecution. Held: That probable cause for such prosecution was shown, both by the above facts, and by the fact that the writ for the plaintiff's arrest was issued by a judge having full jurisdiction, who, on a subsequent hearing of testimony, ordered plaintiff's commitment: *Cooper v. Hart, et al.*, Supreme Court of Pennsylvania, March 21, 1892, per GREEN, J. (23 Rep., 833).—*H. N. S.*

NEGLIGENCE—CONFLICT OF LAWS—WHERE THE LAW OF THE STATE IN WHICH AN ACCIDENT OCCURS DIFFERS FROM THE LAW OF THE STATE WHERE SUIT IS BROUGHT.—Plaintiff, an employee of a railroad company, the defendant, was injured while working in Pennsylvania, where the contract of employment was made, and was to be executed. He brought a suit for damages in Ohio, where he could have recovered, though in Pennsylvania he could not have done so. Held: That under such circumstances he could not recover in Ohio: *Alexander v. Penna. R. R. Co.*, Supreme Court of Ohio, BRADBURY, J., December 8, 1891 (30 Northeast. Rep., 69).—*W. W. S.*

NEGLIGENCE—CONTRIBUTORY—TRESPASSERS ON THE TRACK OF A RAILROAD COMPANY—WHEN FOR THE JURY.—Defendant's train killed a child between 4 and 5 years old on its track. Plaintiff's evidence tended to show a want of ordinary care on the part of defendant in keeping a reasonable look-out for obstructions on the track, and that the child could have been recognized as such for a distance twice that necessary for stopping the train. Held: That the case should have been left to the jury. *Green v. Ohio River R. R. Co.*, Supreme Court of Appeals of West Virginia, HOLT, J., February 12, 1892 (14 Southeast. Rep., 465).—*W. W. S.*

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HISTORICAL STUDIES IN ENGLISH JURISPRU-
DENCE.

I.

PROCEDURE IN EARLY CRIMINAL TRIALS.

BY HAMPTON L. CARSON, ESQ.

In the study of history, everything that has influenced or preserved the manifestations of human thought is worthy of attention, and among many objects of special interest the laws of a people are of primary importance, as exhibiting traits of character nowhere else to be found. It is a saying of Lord Bacon, "that as streams do take tinctures and tastes from the soils through which they flow, so do the laws partake of the flavor and character of the people who enforce them." The truth of this remark has been amply vindicated. Statements, customs, law reports, records and the State trials can be studied like fossil shells, as faithful memorials of the past, as petrified samples of the passions and principles of dead centuries, as well as of their prejudices and inconsistencies.

In considering the laws of England, we are first attracted to a standpoint which enables us to realize the ex-

tent and value of the principles of freedom which are imbedded in the English Constitution. The chief characteristic of Englishmen, and that which is the secret of their present moral, political and intellectual independence, is their appreciation of the dignity of human nature, and of the rights which belonged to freemen. They believed in these from the earliest times, and these they inherited from their German ancestors. The Teutons were a hardy, energetic, fearless people, warlike, and addicted to strong drink, but of noble dispositions; earnest and faithful, holding their women in high esteem, electing their chief on account of his valor, and determining matters of public importance by the suffrages of all.¹ In their own huts, or on their own lands, they were their own masters, and were strongly attached to the idea of home. These principles of Teutonic government, spreading along the shores of the German Ocean, were transplanted into England, and there took deepest root and soonest attained maturity. Even beneath the weight of Norman tyranny and repression they forced their way, and expanded into the noble maxims "that every man's house is his castle," and that "no freeman can be deprived of life, liberty or property, save by the judgment of his peers and the law of the land;" maxims which have been termed "the elixir and storehouse of English freedom."

In frank-pledges and trial by jury, in Magna Charta, the Petitions of Right, the Bill of Rights, the Habeas Corpus Act, and the Privileges of Parliament, we note the sturdy growth of liberty into fit relations to law. The conflicts of the kings with their nobles, the growing interests of trade and commerce, the civil wars and the decisions of Westminster Hall, had alike contributed to build up a body of jurisprudence as splendid as it has proved to be imperishable. The maxims of the law even in very ancient times breathed defiance to tyranny, and, when enforced, securely guarded life and limb; but it is singular to mark how few were the actual safeguards thrown about a criminal on trial, and how slight was the value set by our ancestors upon

¹ Tacitus, *De Germania*.

In fact, the contrast between the theory and of the law is one of the most unexpected of in English history.

any criminal trial, the evidence for the crown, as tion was called, was given under the solemnity which in superstitious days was doubly impres- barbarous rule prevented the prisoner from call- ness in his behalf. Strange as it may seem, it el-hearted Mary Tudor who changed this prac- rected her Chief Justice to listen to whatever d in favor of the subject. Not until the reign iver, could the witnesses summoned for de- orn. In felonies, which embraced all the crimes ye, the law denied to a prisoner a copy of the upon which he was arraigned as well as a copy of jurors. Thus he had little knowledge of against him, and none whatever of the men by was to be tried. The names of the witnesses were also withheld. He was refused the as- counsel to advise him in prison, except by e of court, and was deprived of the use of any n up by counsel to prepare him for trial. He the same assizes, generally on the same day dictionment was found, and therefore had no time his challenges to the jury, except in cases of n, where, it is said, on somewhat doubtful au- t fifteen days must elapse between arraignment These hardships, or, to speak plainly, these justice, were subsequently corrected in the reigns III and Anne. At common law, however, the accused was measured apparently by the grav- charge, for the graver the charge the fewer were es accorded to him, and the more hopeless was defence. It was little less than a mocking in- an thus environed by difficulties created solely

bold's Criminal Practice and Pl., Pomeroy's edition, 551; im. Law, 407—410; Hawkins' Pleas of the Crown, b. 2, ster's Crown Law, 231; Hale's Pleas of the Crown, 256; rneys-at-law, sec. 184.

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by the law, to be told that the benign presumption of that law was in favor of his innocence. How significant was the exclamation of the Duke of Norfolk upon his trial : "I know that one suspected is more than half condemned."¹

Without entering into more detail, the statements just given are sufficiently precise to enable us to realize the terrible danger in which a prisoner stood when charged with crime. In almost every case death stared him in the face, and upon trials for high treason the axe of the executioner was laid beside him—a dreadful reminder of his well-nigh inevitable fate. The prosecutions were conducted by able, experienced and sometimes blood-thirsty attorneys-general, who were eager to command the applause of the king, who had elevated them to office, by the wholesale extinction of those who by legal fiction were deemed to be his enemies. The judges, dependent for their places upon the caprice of an arbitrary monarch, and unwilling to forfeit his favor, too often threw the weight of their position into the scale against the accused. Juries were bullied and browbeaten into verdicts of guilty, or, upon their refusal to convict, were imprisoned, starved, fined or attainted for their contumacy. In order to secure a fair trial the necessity for a spirited defence by eloquent and fearless advocates seems to us indispensable ; but the common law, which has been so highly praised for its humanity and its wisdom, denied the right to counsel in the very cases where they were most needed, and permitted prisoners—ignorant of law, poor and friendless, feeble in body and mind, unaccustomed to public assemblies, dragged to trial almost immediately after their arrest and arraignment, without copies of the indictment, without knowing by whom they were to be confronted or by whom they were to be tried, without a right to have their witnesses sworn—to struggle single-handed against the overwhelming influence and tyranny of the crown.

Thus were the fountains of justice crimsoned by State prosecutions; the walls of prisons were pierced by the shrieks of despairing men and women, hopelessly doomed.

¹ 1 State Trials, Howell's edition, 965.

Accusation was tantamount to conviction; conviction meant speedy death.

Upon the trial of Thomas Howard, Duke of Norfolk, in 1571, for high treason in supporting the right of Mary, Queen of Scots, to the throne of England, the prisoner made a vain appeal to the court for counsel even upon questions of law. "I have," he said, "had very short warning to provide answer to so great a matter; I have not had fourteen hours in all, both day and night, and now I neither have the same statute alleged, and yet I am put at once to the whole herd of laws, not knowing which particularly to answer unto; . . . therefore, with reverence and humble submission, I am led to think I may have counsel. . . . I am hardly handled. I have had short warning and no books." Chief-Justice Dyer refused the request by answering that counsel could not be allowed in point of treason.¹

During the trial of that pure patriot, Algernon Sidney, whose philosophical speculations anticipated the doctrines of Locke and Jefferson, application was made by him for counsel, and he contended that conspiring to levy war was not treason; when he objected that some of the jury were not freeholders of the county in which the venue of the indictment was laid, he was answered by Chief-Justice Jeffreys: "If you assign us any particular point of law, if the *Court think it such a point as may be worth debating*, you shall have counsel." When Sergeant Barnfield arose as *Amicus Curie*, and suggested in arrest of judgment that there was a material defect in the indictment, Jeffreys coolly observed, "We have heard of it already; we thank you for your friendship and are satisfied." He then sentenced the illustrious prisoner to death.²

The judges in the time of the Commonwealth were no less arbitrary. Their behavior toward John Tilburn, on his trial as a traitor for publishing criticisms upon the government of Cromwell, was more decorous in tone but none the less severe than that of Justices Foster or Scroggs. Time and time again he besought the appointment of

¹ 1 State Trials, 965.

² 9 State Trials, 834.

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counsel, and was always refused. Then, bursting out with long-suppressed passion, he cried: "Pray let me have fair play, and not be wound and screwed up into hazards and snares. . . . In so extraordinary a case for me to be denied to consult with the counsel, I tell you, Sir, it is most unjust and the most unrighteous thing in my apprehension that I ever heard or saw in all my life. O Lord! was there ever such a pack of unjust and unrighteous judges in the world? . . . I would rather have died in this very court before I would have pleaded one word unto you, for now you go about by my own ignorance and folly to make myself guilty of taking away my own life, and therefore, unless you will permit me counsel upon this lack, I am resolved to die." He was acquitted, however, by the jury, and lived to be tried again for new boldness of speech and action—characteristics which had won for him the honorable title of Free-born John."¹

An apology for this harsh rule was offered in the maxim that the judge was counsel for the prisoner; that it was his duty to see that the proceedings were regular, to examine witnesses for the defendant, to advise him for his benefit, to hear his defence with patience, and in general to take care that he was neither irregularly nor unjustly convicted. The maxim was benevolent, but few judges ever gave the slightest heed to it in practice.

When Penn and Mead were tried at the old Bailey for preaching to a seditious and tumultuous assembly, the Recorder put the following questions:

"What say you, Mr. Mead, were you there?"

Mead: "It is a maxim of law that no one is bound to accuse himself; and why dost thou offer to ensnare me with such a question? Doth not this show thy malice? Is this like unto a judge that ought to be counsel for the prisoner at the bar?"

Recorder: "Sir, hold your tongue; I did not go about to ensnare you."²

In some instances the prisoners were quite equal to the task of self-defence, and were more than a match in wit

¹ 4 State Trials, 1299.

² 6 State Trials, 958.

business for the judges. William Penn, then a youth of twenty-five years of age, desired to know by what law it was that they prosecuted him, and upon what law it was that they returned the indictment. The Recorder replied, there was no law. William Penn asked where that law was. The Recorder did not think it worth while to run over all the adjudged cases for so many years, which they called the law, to satisfy his curiosity. Penn replied, if there was no law, it ought not to be so hard to produce.

Recorder: "The question is, whether you are guilty of the crime on which the indictment is returned."

Penn: "The question is not, whether I am guilty of the crime on which the indictment is returned, but whether this indictment be legal. It is a general and imperfect answer to say it is the law, unless we know where and what it is; for where there is no law, there is no transgression; and that which is not in being is so far from being common as to be no law at all."

Recorder: "Sir, you are a troublesome fellow, and it is the honor of the Court to suffer you to go on."

Penn: "I have asked but one question, and you have answered me, though the rights and privileges of an Englishman are concerned in it."

Recorder: "If I should suffer you to ask questions till to-morrow morning, you would be never the wiser."

Penn: "That is according as the answers are."

The grossest violation of the maxim that the judge should be impartial, and the darkest spot upon the unsullied ermine of an English judge, was the behavior of the Recorder upon the trial of Lady Alice Lisle. She was the widow of one of the regicides, of more than seventy years of age, and, prompted by the same spirit of benevolence that filled the hearts of those in our own day who treated the fugitive slave as he groped for freedom by the light of the North star, had given food and lodging to a young clergyman named Hicks, who had been with her in the prison of Monmouth. The indictment charged her with treason and as "moved and seduced by the instigation

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of the devil" to entertain wicked and treasonable designs. There was no proof whatever that she knew that the man she had harbored had ever been with the rebel army, and the jury declared that they were not satisfied upon this point, which was the only important one in the case. The judge usurped the functions of the counsel for the crown, and, like a wolf ravening for prey, pressed a reluctant and conscientious witness so hard as to "clatter him out of his senses." Blasphemy, ribaldry and the most horrid jests and imprecations were showered upon him in the effort to induce him to say something that would convict the prisoner, and while the judge thus dragooned the witness, the gentle prisoner, with a conscience void of offence and with unfaltering trust in God, bowed her gray head upon the dock and slept like a tired child. Three times did the jury refuse to convict, and as often did Jeffreys remand them, arbitrarily declaring, "there is as full proof as proof can be," and finally extorted a verdict of guilty by the threat of an attain. He then sentenced the unhappy lady to be burned to death, but she escaped this terrible fate by a commutation of the sentence into death by hanging.¹

Not so fortunate in the manner of her death was Elizabeth Grant, a sister of charity, who, ministering to the wants of the sick and poor, had, like Alice Lisle, unwittingly entertained a hunted fugitive who was base enough to turn informer and witness. As she drew the fagots and blazing straw about her to hasten her death, the spectators burst into tears, and among them stood the great-souled William Penn. The scene was not without its lessons for him and its results for us. Well may we exclaim with one of that day: "This was not justice, it was courage!"

The rule that prisoners tried for felony should not have counsel, and the practice under it, had their admirers. Lord Coke, the great oracle of English law, declared that the reason of its adoption was because the evidence by which the prisoner was to be condemned ought to be so very evident and so plain that all the counsel in the world

¹ II State Trials, 322.

should not be able to answer it.¹ Sir John Davys, in the preface to his reports, declared, with strange perversity of logic, that "our law doth abhor the defence and maintenance of bad causes more than any other law in the world." Sergeant Hawkins, who wrote at a time when more liberal views ought to have prevailed, asserted that the rule was reasonable, "as every one of common understanding may as properly speak to a matter of fact as if he were the best lawyer."² Of a truth said my Lord Coke: "The reason of the common law is not man's natural reason."

The rule did not pass unchallenged. The seeds of its dissolution, though slow in development, had been early sown. As far back as the reign of Edward II, the author of the *Mirror of Justice* had declared that counsel learned in the law "were more necessary for the defence of indictments and appeals of felony than upon other venial cases." The venerable Whitelock assailed it in debate; Sir Robert Atkins, the Attorney-General of Charles I, declared it "a severity," and significantly said that he knew from "experience what the maxim meant that the judge was counsel for the prisoner." Even Jeffreys declared that it was "an injustice that a man should have counsel to defend a two-penny trespass, but that in defence of life he should have none."³

The Bloody Assizes had aroused the sleeping justice of the nation, and in 1695 a bill was passed allowing the prisoners in cases of high treason the assistance of counsel not exceeding two. Many wiseacres predicted the ruin of the State. Bishop Barret, after stating that the bill had passed contrary to the hopes of those then at the head of affairs, said: "The design of it seems to be to make men as safe in all treasonable practices as possible." The judges were the avowed enemies of the change. The act was to go into effect on the 25th of March, 1696. On the 24th of March, Sir William Parkyns, a wealthy knight, bred to the law, was put upon his trial for having been concerned in a Jacobite plot to assassinate the King. He prayed that

¹ Inst., 137.

² 2 Hawkins' Pleas of C. C., 39.

³ See the learned note, 5 State Trials, 467.

counsel might be allowed him, and cited the preamble of the statute as declaring that such a demand was reasonable and just. Lord Holt, one of the greatest of English judges, and of the best of men, replied: "God forbid that we should anticipate the operation of an Act of Parliament even by a single day." The prisoner then asked that the trial be postponed, but his application was refused, and the unlucky man was actually convicted and executed six hours before the bill went into effect.¹

It was a long time, however, before counsel were bold enough to defend their clients with spirit, and it remained for Dunning and the never-to-be-daunted Erskine to establish the rights of the Bar; while it was not until 1836—though we in this country had enjoyed the right from early colonial days—that prisoners in England, indicted for felony, could command the assistance of counsel. In cases of misdemeanor and in civil actions the right to counsel had always existed without dispute.

THE PENNSYLVANIA DEFEASANCE ACT OF
JUNE 8, 1881, AND THE CASE OF SANKEY
v. HAWLEY.

BY C. STUART PATTERSON, ESQ.

Prior to the enactment of the Act of June 8, 1881, it was the law of Pennsylvania that, as the essence of a mortgage is a conveyance of land as security for the payment of a debt, a deed absolute in terms accompanied by a collateral agreement for a loan of money by the grantee to the grantor constituted in equity a mortgage;² and that it could be shown by parol that a deed, though in terms absolute, was, in fact, a mortgage.³

¹ 13 State Trials, 72.

² *Friedley v. Hamilton*, 17 S. & R., 70; *Harper's Appeal*, 64 Pa., 315.

³ *Heister v. Madeira*, 3 W. & S., 384; *Umbenhower v. Miller*, 101 Pa., 71.

It was also, and it is yet, the law of Pennsylvania, that although the recording statutes declare that no mortgage shall be sufficient to pass any estate unless recorded in accordance with the statutes, nevertheless an unrecorded mortgage is valid and enforceable as against the mortgagor and his heirs and assigns, for the reasons as stated by Judge SERGEANT,¹ that, while there is plausibility in the argument that the strict terms of the statute ought to be enforced, and that nothing should be allowed to dispense with the actual recording of the instrument, yet when this doctrine comes to be applied in practice it is found to be too strict to be insisted upon as between the mortgagee and mortgagor, for *summum jus* then proves to be *summa injuria*, and the result of the strict construction would be to sanction injustice and to reward the most palpable fraud and iniquity; and the courts, therefore, in the exercise of equity, look to the object and design of the recording acts rather than to their dry letter, and, therefore, hold that the recording of a mortgage is unnecessary as between the mortgagor and the mortgagee.²

It was also, and it is yet, the law that although the Statute of Frauds requires conveyances of land to be in writing and signed by the parties, nevertheless a parol contract for the sale of lands is enforceable as between the parties where a court of equity finds the parties unequivocally in a position different from that in which, according to their legal rights, they would be if there were no contract;³ and in such cases the defendant is charged, not upon the contract, but upon the equities resulting from the acts done in execution of the contract; for if those equities were excluded, injustice not contemplated by the statute would be done.⁴

It is, of course, unnecessary that I should quote any authorities to establish the recognition by the Supreme Court of Pennsylvania of the doctrine of part performance.

¹ Jaques v. Weeks, 7 Watts, 269.

² See also Tryon v. Munson, 72 Pa., 250; McLaughlin v. Ihmsen, 85 id., 364.

³ Dale v. Hamilton, 5 Hare, 381.

⁴ Maddison v. Alderson, 8 Appeal Cases, 467; per Selborne, L. C.

Such being the state of the law, the Act of June 8, 1881,¹ was passed. That act is as follows :

“That no defeasance to any deed for real estate regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated, within sixty days from the execution thereof; and such defeasances shall be recorded and indexed as mortgages by the recorder.”

The Act of 1881 seems to require the defeasance (1) to be made at the time the deed is made; (2) to be in writing; (3) to be signed by the grantee or mortgagee; (4) to be sealed; (5) to be acknowledged; (6) to be delivered by the grantee or mortgagee to the grantor or mortgagor; (7) to be recorded within sixty days from its execution, and (8) to be indexed as a mortgage. Of these requirements the second, third, fourth, and sixth would seem to be the only ones which can be of any possible efficacy as between the mortgagor and the mortgagee. The first, the contemporaneous execution, would seem to be immaterial, if there be a subsequent written admission by the mortgagee. The fifth, the acknowledgment, is nothing more than a prerequisite to the recording; and the seventh, the recording, and the eighth, the indexing, being only means of obtaining actual notice, and, therefore, constituting in themselves constructive notice, of the fact that the transaction is a mortgage and not a sale, could be of no practical use to the mortgagor, nor to a mortgagee, who having made a contract intended honestly to perform it; while, on the other hand, these requisites, if held to be essential to the legal validity of the paper *inter partes*, might be used as a means of fraud and as a trap to catch the unwary. The fourth requisite, sealing, is worse than useless, for under Hacker's Appeal² a judge is permitted to recognize as a seal anything which he

¹ P. L., 84.

² 121 Pa., 192.

chooses to regard as such. The second requisite, the writing, and the third, the signature of the party to be bound thereby, are, of course, justifiable upon the reason which supports the Statute of Frauds, and that is, that a written admission is preferable to oral evidence, because the latter may by mistake, or by fraud, misrepresent the transaction.

The Act of 1881, therefore, so far as regards its requirements of acknowledgment, recording, and indexing, would seem to be nothing more than a recording statute, and as such requiring the construction which has been uniformly given to recording statutes ever since *Levinz v. Will*¹ was decided; and so far as regards its requirements of reduction to writing, and contemporaneous execution by signing, sealing, and delivery by the mortgagee, it would seem to be nothing more than a statute of frauds and as such requiring a construction in accordance with the principles of equity.

It would seem also that the Legislature never could have intended by the Act of 1881 to make acknowledgment, recording, or indexing an essential requisite to the legal validity of the defeasance, as between the mortgagor and mortgagee; for the object of indexing is to afford an easy means of finding a record; the object of recording is to give notice to parties who otherwise would not know of the existence of the instrument; and the object of acknowledgment is to sufficiently attest a paper to permit it to be recorded; and of what possible use could either the indexing, or the recording, or the acknowledgment, be to a mortgagee who had executed the written defeasance, or to a mortgagor who had received the paper from the mortgagee?

In 1888, the case of *Sankey v. Hawley*² came before the Supreme Court of Pennsylvania. The facts were these: Samuel K. Sankey, being the owner of a lot of ground and a planing-mill thereon erected, on December 17, 1883, borrowed from Hawley four thousand dollars, and as security for the loan executed and delivered to Hawley a deed in fee. Hawley contemporaneously executed and delivered to Sankey the following written defeasance:

¹ 1 Dall., 430.

² 118 Pa., 30.

“ DUNCANNON, Pa., December 17, 1883.

“This is to certify that S. K. Sankey and wife have this day deeded me their property (see Deed Book Q., Vol. 2, page 634, etc., New Bloomfield, Pa.), for the purpose of securing the loan of four thousand dollars, and I hereby agree to deed the above property back to S. K. Sankey, in fee simple, with all the improvements thereon erected, upon the payment of the four thousand dollars above referred to. Redeemable within two years.

Witness,

JOSEPH M. HAWLEY.

WILLIAM BOTHWELL.”

Subsequently Samuel K. Sankey paid Hawley one thousand dollars on account of the loan, and afterwards conveyed the land to his father, Jacob Sankey, against whom Hawley brought ejectment.

At the trial, the admission of the defeasance in evidence was objected to because, although in writing, it had not been acknowledged and recorded in accordance with the Act of 1881, and the judge sustained the objection. The signatures of Hawley and the subscribing witness were proved, and no objection was made as to the absence of a seal. After the facts as above stated had been proved by parol, a verdict was directed for the plaintiff, and judgment on that verdict was affirmed in the Supreme Court, Chief-Justice GORDON delivering the opinion.

That judgment in favor of the plaintiff allowed one who had loaned four thousand dollars, and to whom one thousand dollars had subsequently been repaid, to retain without possibility of redemption the land which he had admitted over his own signature to have been conveyed to him only as security for his loan of four thousand dollars, although one-fourth of the loan had been repaid, and although his admission was as a defeasance so far in strict accordance with the requirements of the Act of 1881, that it was contemporaneous with the deed, that it was in writing, and that it was delivered by the grantee and mortgagee to the grantor and mortgagor, and that it was under seal; for as no point was made as to its not being under seal, and as the report of the case is silent as to that, it must be taken to

under seal. It, therefore, only fell short of a compliance with the Act of 1881 in that it was not signed, recorded, nor indexed as a mortgage. It is not to be thought, that the judge at the trial should have returned a verdict for the plaintiff, but a conditional verdict for the defendant on terms of repayment of the loan with interest, on the ground that the defendant's title was in strict accordance with the Act in so far as that Act could possibly apply as between the mortgagor and the mortgagee.

The mistaken conclusion reached by the Court will appear, if it be observed that if Sankey's deed of conveyance to Hawley had, like Hawley's written defeasance, remained unrecorded, Hawley could have recovered judgment against Sankey upon the unrecorded deed as to the conveyance, while he prevented the admission of his own unrecorded contemporaneous defeasance, which he solemnly admitted over his own signature that the transaction was a mortgage and not a sale.

In deciding *Sankey v. Hawley*, a court of equity should not use an act of the Legislature to be used as a means of perpetrating a fraud. I venture to think that in so doing the court violated established equitable principles.

The grounds of decision stated in the opinion are (1) that the Act of 1881 is plain and positive in its terms; (2) that it is not a recording statute, and as such efficacious in favor of purchasers and encumbrancers, but that it establishes a rule of evidence which prevents a court of equity from permitting an absolute deed to be converted into a mortgage otherwise than by all the evidence presented in the Act; and (3) that the Act of 1881 would, if strictly applied, be given *inter partes* to each and every of its provisions, be nugatory and merely declaratory of the existing law.

In reply to these reasons, it may be said: (1) the Act is no more "plain and positive in its terms" than recording statutes and the Statute of Frauds, and the courts have consistently refused to enforce those statutes *inter partes*, whenever their enforcement would result in injustice.

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(2) The Act of 1881 does not prescribe a rule of evidence of a more binding and stringent character than that which the Statute of Frauds prescribes, and yet, as Lord WESTBURY said in *McCormick v. Grogan*,¹ "the Court of Equity has from a very early period decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the Court of Equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act and imposes upon him a personal obligation because he applies the act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills."

Even if it were held that, by force of the Act of 1881, the legal estate in fee vested in Hawley by Sankey's deed could not be reduced to a mortgage, yet a court of equity ought to have seen in Hawley's written defeasance, in Sankey's retention of possession after his conveyance, and in his subsequent payment of one thousand dollars to Hawley, circumstance sufficient, notwithstanding the Act of 1881, to constitute Hawley a trustee for Sankey as to the surplus in value of the property over and above the balance of principal and interest due to Hawley on his loan. A court which enforces the doctrine of part performance, and which, in the exercise of equitable principles, reforms deeds, ought not to have stopped short of that conclusion.

If the rule of evidence prescribed by the Act could be regarded as of the stringent and binding character which the Court attributes to it, it must follow that each one of the eight requisites is of equally indispensable efficacy, and it must also follow that a written and sealed contemporaneous defeasance, acknowledged, delivered and recorded in accordance with the Act, will be unavailing *inter partes* if the Recorder's Clerk shall fail to index the mortgage; yet *Luch's Appeal*,² which held fatal as against subsequent purchasers a failure by the Recorder to record a mortgage

¹ L. R. 4, H. L., 97.

² 44 Pa., 519.

in the proper book has been overruled by *Glading v. Frick*,¹ and *Paige v. Wheeler*.²

(3) It is not an accurate statement to say that the Act of 1881 would be merely declaratory of the existing law, if its requirements as to acknowledgment, recording, and indexing are not held to be applicable *inter partes*; for, as has been pointed out, that statute is also a statute of frauds in that it requires the defeasance to be in writing, and signed by the mortgagee, whereas prior to its enactment no written defeasance was necessary *inter partes*.

It is also to be noted that the Act of 1881 changes the law in another, and an important, respect. Prior to that Act it was the law, that while a deed absolute in terms but accompanied by a collateral agreement for a loan of money by the grantee to the grantor constituted in equity a mortgage, yet a purchaser for value and without notice, taking a deed from the original grantee, at any time subsequent to the recording of the deed to that original grantee, took a good title as against the original grantor.³ Under the Act of 1881, as the grantor and mortgagor has sixty days within which to record the defeasance, it follows that until sixty days from the date of any deed of conveyance shall have passed, no one can purchase from the grantee therein without encountering the risk of having his title defeated by the recording of a defeasance and by its conversion of his vendor's apparently absolute deed into a mortgage. If the Act were, in any respect, judicious legislation, the clause giving sixty days in which to record the defeasance would yet be objectionable because it is inconsistent with the policy of recent legislation, as evidenced by the Act of May 25th, 1878,⁴ which, probably, gives to purchase-money mortgages in Philadelphia a lien only from the date of their record, and because it opens the door to fraud.

¹ 88 Pa., 460.

² 92 Pa., 282.

³ *Manufacturers' Bank v. the Bank of Pennsylvania*, 7 W. & S., 355; *Jaques v. Weeks*, 7 Watts, 261.

⁴ P.L., 151.

SUPREME COURT OF PENNSYLVANIA.

TAYLOR v. MURPHY.

SYLLABUS.

Mechanics' Liens—Right of Sub-Contractor to file Lien.—The decision in *Shroeder v. Galland*, 134 Pa., 277, that where the contractor has stipulated that no lien shall be filed, the sub-contractor is bound by the stipulation and has no right of lien, approved. Such an agreement violates no rule of public policy. A statute that should disregard its obligation and authorize the entry of a lien for work or materials in violation of its terms would seem to be within the prohibition of the Constitution of Pennsylvania, Art. 1, § 17, which declares that no law impairing the obligation of contracts shall be passed. It might also be within the limitation on the powers of the several States, found in Art. 1, § 10, of the Constitution of the United States.

But there is no waiver of the right to enter a lien or covenant that none shall be entered, where the contractor has merely agreed "to release and discharge the said houses from the operation of all liens, either for materials furnished, or work done in the construction of the same."

It is no defence against the lien of a sub-contractor that the building was erected under a written contract, in which the contractor was bound to provide all materials and labor and complete the building, for a fixed sum, to be paid when the building was finished; and that he did not finish it.

A sub-contractor or material-man is entitled to a lien for what his materials or labor are reasonably worth, although the aggregate of the liens against the building is greater than the contract price.

A general allegation in an affidavit of defence in a suit on a mechanics' lien, that the materials for which the lien is filed were not such as the contract required, is insufficient.

STATEMENT OF THE CASE.

A *sci. fa.* having been issued on the lien filed by the plaintiffs, who had furnished materials for the house in question upon the order of the contractor, the owner filed an affidavit of defence, which the Court below held insufficient and entered judgment for the plaintiffs. Defendant appealed, specifying for error this action of the Court.

The other facts sufficiently appear in the opinion.¹

¹ Reported in 30 Weekly Notes, 27; 1 Adv. Rep., 540.

OPINION OF THE COURT.

WILLIAMS, J., April 11, 1892.—The plaintiff furnished lumber and manufactured woodwork, for the erection of defendant's dwelling-house, on the order or direction of Christy, the contractor. The mechanic's lien, on which the writ of *scire facias* in this case is issued, was entered for the amount of material so furnished. The defendant interposed an affidavit of defence, in which several reasons were urged as sufficient to prevent the entry of a judgment and carry the case to a jury for trial. These may be stated as follows:

(1) That the house was erected under a written contract, in which Christy was bound to provide all material and labor, and complete the house, for the sum of \$3,750, to be paid when the building was finished; that he did not finish it, and for that reason nothing was due to him or to a sub-contractor under him.

(2) That the aggregate amount of the liens entered against the building, together with the cost of completing it, would exceed the contract price, and that the liens, if sustained, should abate proportionably, in order to bring the total cost down to the contract price.

(3) That no liens could be entered, under the express stipulations of the contract with Christy, the builder.

(4) That the material furnished was not such as the contract required, and, in consequence of its defective character, the house was worth \$125 less than it otherwise would have been, for which sum, at least, there was a good defence.

It is urged that the principle announced in *Schroeder v. Galland*¹ is broad enough to cover all the propositions contained in the affidavit, and makes a reversal of the judgment entered in the Court below necessary. In *Weaver v. Sheeler*,² we held that all persons furnishing labor or materials for the erection of a building were bound to take notice of the title of the apparent owner. If he was an intruder without right, the lien of

¹ 134 Pa., 277.

² 118 Pa., 634.

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contractor and sub-contractor must alike fall. If he held an equitable title only, the lien would bind such title as he had, and no more. In *Schroeder v. Galland*, we went a step further, and held that, where the contractor had stipulated that no lien should be filed, he could not confer a right upon his sub-contractor that he did not possess. The contract between the owner and the contractor is the source from which the right of the sub-contractor is derived under the provisions of the law, and it is self-evident that a stream cannot rise higher than its source. The agreement of the builder, to provide all the labor and materials for the erection of a building, and look for his security solely to the personal responsibility of the owner, leaving the building unincumbered by liens, is a valid and binding one. It violates no rule of public policy. A statute that should disregard its obligation, and authorize the entry of a lien for work or materials, in violation of its terms, would seem to be within the prohibition of the Constitution, Art. I, section 17, which declares that no law impairing the obligation of contracts shall be passed. It might also be within the limitation on the powers of the several States, found in Art. I, section 10, of the Constitution of the United States. We are thoroughly satisfied, therefore, with *Schroeder v. Galland*, and our only inquiry is, whether this case falls within the rule there laid down.

The third ground of defence, stated in the affidavit, puts the case in the precise condition of *Schroeder v. Galland*; but, on turning to the clause in the contract relied on to raise the question, it will be seen that it is insufficient. It contains the express promise of the contractor, "to release and discharge the said houses from the operation of all liens, either for materials furnished, or work done in the construction of the same." This is not a waiver of the right to enter a lien, or a covenant that none shall be entered. It is merely a promise to release and discharge "such liens as may be entered, prior to the day when payment in full shall be made to the contractor." He cannot demand the payment of the balance due upon his contract until he has performed the undertaking to release

and discharge the liens that may have been entered against the building. This does not fall within the rule invoked. Neither do the first and second grounds of the defence.

It would be unreasonable to require one who was called on to furnish material for the foundation or walls of a house, to anticipate the cost of all the materials to be furnished by others, and of all the labor to be done, in order to the full completion of the structure. He can know, and he must take notice, as we have seen, of the title of the apparent owner, and of the general character of the agreement under which the contractor is proceeding to build. He can know, and must take notice of the general character of the building, and of the materials and labor proper to be used in its construction. He must see to it that the materials he supplies are such as may be reasonably needed for, and used about, such a building, both as to their quantity and quality; but here his responsibility ends. Subject to these qualifications and conditions he may bind the building for what his materials or labor may be reasonably worth.

This brings us to the last position taken by the defendant, viz., that he is entitled to set off the sum of \$125 upon the plaintiff's demand, for the reason that the materials were not such as the contract required. The only provision in the contract on which this averment can rest, is that which follows: "The construction, workmanship and materials furnished are to be similar to that used and performed in construction of house No. 139 Lafayette Street, Germantown." The materials furnished by the plaintiff included doors, sash, shutters and ornamental woodwork, as well as flooring, shingles, joists and other rough lumber, amounting in the aggregate to nearly \$900. If the affidavit had alleged a deficiency in the quality of the doors, or any other portion of the materials furnished, as compared with similar materials used in No. 139 Lafayette Street, a different question would have been raised. As it is, the allegation of a deficiency in quality relates to the materials generally, and the extent of the deficiency is measured, not by a difference in the value of the articles furnished as

compared with those contracted for, but by an alleged difference in the value of the house as a whole, on account of defectiveness in the material generally. The Court below was right in treating this averment as altogether too general.

Judgment affirmed.

MECHANICS' LIENS.

The Penna. Act of June 16th, 1836, P. L., 696; Purdon, 1157, enacts that "every building erected . . . shall be subject to a lien for the payment of all debts contracted for work done, or materials furnished for or about the erection or construction of the same." "Every person entitled to such lien shall file a claim or statement of his demand, in the office of the prothonotary of the court of common pleas of the county in which the building may be situate;" which claim must set forth, *inter alia*, "the names of the party claimant and of the owner or reputed owner of the building, and also of the contractor, architect or builder, where the contract of the claimant was made with such contractor, architect or builder;" also, "the amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished, or the work was done, as the case may be." There is no provision for the filing or recording of the contract between the owner and the general contractor; nor any statement that the claims of the material-man or sub-contractor shall in any way be subject to the terms of the contract between the owner and the general contractor.

Probably in consequence of the decision in *Haley v. Prosser*, 8

W. & S., 134, that a special agreement under all circumstances deprives the party of his lien, and that it is only when there is no agreement in which the terms of the bargain are particularly stated that the mechanic is supposed to contract on the basis of the law and rely upon the lien for his security, the Act of April 16th, 1845, P. L., 538, Purdon, page 1160, pl. 19, was passed, which enacts as follows: "It is hereby declared that the provisions of the Act approved June 16th, 1836, entitled 'an Act relating to the lien of mechanics and others upon buildings' according to the true intent and meaning thereof, extend to and embrace claims for labor done and materials furnished and used in erecting any house or other building, which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, and the provisions of the said Act shall be so construed; and no claim, which has been or may be filed against any house or other building or the lien thereof, or any proceedings thereon shall be in any manner affected by reason of any contract having been entered into for the erection of such building, but the same shall be held as good and valid as if the building had not been erected by contract."

In *Young v. Lyman* in 9 Pa. St.,

449, decided in 1848, Young filed a lien against Lyman for work done under a written contract for the erection of certain houses, in which contract there was a clause as follows: "All materials to be paid for four months after the completion of the job, and Young to give security in \$500 that no lien shall be entered on the houses;" which stipulation the Court ruled to be "that no other person or sub-contractor shall file a lien," and that Young was therefore entitled to his lien. In 1880, in the case of Long v. Caffery, 93 Pa. St., 526, Long expressly stipulated "that no mechanic's or other lien shall be entered against said building by the said Long or the material contractor, or workmen." The court decided that Long had waived his right of lien, and that this agreement on his part was not dependent upon a covenant by the owner to insure the building and assign the policy of insurance to Long as collateral security. In 1888 the case of Scheid v. Rapp, 121 Pa. St., 593, came before the Court. Here the contract contained the following provision: "And the said Dionis Rapp hereby for himself, his heirs, executors and administrators (covenants) that he will not suffer or permit to be filed in the Court of Common Pleas of Lancaster County any mechanics' lien or liens against the said building for the period of six months after its completion." It was argued that under the decision of Young v. Lyman, *supra*, Rapp had not waived his right of lien; but the Supreme Court held that he had, saying: "The sole question is whether the contractor by his covenant waived the right to file, or authorize a lien to be filed,

in his own favor. We think he did. While the phraseology of the stipulation is different from that of Long v. Caffery, 93 Pa., 526, the legal effect of both is the same. The lien under consideration was necessarily filed by the plaintiff below, himself, or by his sufferance or permission. In either case, it was as clearly a violation of his covenant as if he had suffered or permitted any mechanic or material-man to file a lien." Young v. Lyman was not cited by the Court, but may be considered to have been overruled by this decision.

The case of Campbell v. Schaife was decided by the District Court of Allegheny County, in 1851, and is reported in 1 Phila., 187. In this case a lien was filed by sub-contractors, and the owners filed, *inter alia*, a plea "That the debt claim ought not to be levied on said house, because the plaintiffs were sub-contractors under one James Millinger (impleaded with the owners), who had undertaken to erect said house for the owners, and to furnish materials, and to receive payment therefor *partly* in merchandise and *partly* in money, in one, two and three years after the completion of the building; concluding with an averment of readiness, verification and prayer for judgment, etc." The Court decided that this plea was vicious in not stating specifically the amounts to be paid in goods and money respectively, and the kind of goods and times of payment; and that it was a plea in bar and not in suspension of the remedy; that it should have been a plea in abatement, postponing the right to a *sci. fa.* on the lien; the Court saying: "The best position in which the owners of the building can ask to be placed, is to consider them as

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having made the contract themselves with the sub-contractor, as to the time and mode of payment. Surely the lien law is broad enough in its terms to allow a lien even with a stipulated mode of payment. The lien law then stands as security for the payment in *this mode*: and not until a failure thus to pay, does the party acquire a right to the remedy by *sci. fa.*, and then he may claim a judgment for the payment in money. . . . Even on a lien, payable by instalments, part of which may not be due, I see no great difficulty in framing the pleadings, verdict, and judgment in such a manner that the contract shall be enforced according to its terms. Nor does the difficulty seem insurmountable where part of the suspended payments are to be made in goods." LOWRIE, J., further said, that as the informality of the plea might readily be amended, and the counsel had discussed the question which would have to be decided if it were a plea in abatement, he would take up that question: "Are sub-contractors in the erection of a house affected, as to the time and mode of payment, by the contract made between the owners and the builder?"

"The law creates a lien for all debts contracted for work done and materials furnished for the erection of the house; and this phraseology proves that this lien, like all analogous liens, is founded on contract express or implied. And here, contrary to the rule as to other liens, the law, in another clause, gives a lien even in favor of a sub-contractor. On what principle is it founded?"

"It must be on contract with the owner, either directly or indirectly; for it is only thus that one man can

ever acquire a claim upon the property of another. And in this way the connection is plain. The owner contracts with a builder to erect a house on certain terms, and the builder makes a sub-contract with a material-man to supply the materials. The claim of relationship consists of but two links, the second of which hangs by the first, and will bear no greater weight. The sub-contractor comes in by reason of his direct contract relation to the builder, and the right of lien of the former for his claim, is, *pro tanto*, substitutionary to that of the latter. As against the owner, the terms of the principal contract, and, as against the builder, the terms of the sub-contract, limit and qualify the lien of the sub-contractor, so as to prevent his claim from abating the terms of either contract. And it is because the lien of the sub-contractor is by way of abrogation to the right of the builder, that the latter is made a party to the proceeding.

"The justice of this limitation of the right of the sub-contractor is very plain; for, if it were otherwise, no man could ever build a house with any certainty as to the cost of it, unless he employed all the workmen, and purchased all the materials himself. He might find it built of an entirely different character from that contracted for, and yet have to pay the sub-contractor, though the builder could have no claim upon him. He might contract for a house at \$1,000 and find liens established against it for \$2,000.

"If such were the case, no prudent man would make a contract to have a house erected, except with a builder who had ample means to secure him against liens, and such men only could obtain the most de-

sirable contracts. The allowance of any lien at all to a sub-contractor is a special privilege, granted only in case of buildings; and it is not unreasonable to require him to look to the principal contract, to ascertain whether it is such as to justify him in becoming a contractor under it.

"The argument that the law and the principal contract make the builder the agent of the owner, proves nothing. Suppose the fact to be so; still his agency is only special, limited by the terms of the contract. He is to employ men to build the house in the manner and on the terms there indicated. For anything beyond that he exceeds his authority and does not bind his principal. If, under a contract to build a brick dwelling-house, he erects a wooden stable, I do not see how he or his sub-contractor can claim any lien. Yet the latter could do so, if the sub-contract were not dependent on the principal one.

"To construe the law as is contended for by the plaintiffs, would be to place the owner in the relation of a protector to all those who contribute to the erection of the house. But the law treats every man as capable of taking care of himself. It constitutes no relation of protection or dependence among men who have arrived at legal discretion. It looks only to their contract relations, and adapts its remedies to the enforcement of these; and, if necessary for this end, it takes hold of the debtor's effects in the hands of other persons. In cases like the present it does more; for it gives a contingent lien on those effects in advance of their being earned."

This case was not cited, it is believed, in any opinion of the Su-

preme Court until 1890, in the case of *Schroeder v. Galland*, hereafter referred to. In Mr. Miller's edition of *Sergeant's Mechanics' Lien Law*, page 75, the decision is spoken of in this way: "If this decision be the law, it establishes a most important doctrine. Every person employed by a contractor is presumed to have seen his contract, and as against the owner and his house, his claim cannot rise beyond it, or depart from its terms. We believe, however, that this decision is not regarded in practice or usage."

In the case of *Odd Fellows' Hall v. Masser*, 24 Pa. St., 507 (1855), the Court laid down *inter alia* the following propositions:

(1) "That where materials for the construction of a building, contracted for in good faith, are delivered to the contractor for the building, a lien for the price of the materials may be filed against the building, although the materials were not used in the construction, nor were of the right quality for a specific use, if that fact was unknown to the seller, and they were of such a character as to justify their use in the construction generally.

(2) "That where the materials furnished are of the kind that would induce a careful, prudent and skilful man, acquainted with the building, to believe that they could be used in its erection, and if they could in fact be usefully employed in its construction, then the material-man is not bound to inquire into the character of the materials which the contractor had agreed with the owner of the building to use in its construction."

In *Given v. The Bethlehem Church*, 11 W. N. C., 371, the Court of Common Pleas No. 4, Philadel-

phia County, in an opinion by ELCOCK, J., held that where a sub-contractor had gone on the bond of indemnity of the principal contractor to the owner against all claims and liens for work and labor done and materials furnished, he could not himself file a lien; to this extent the opinion goes, although the decision was only that there had been error in the rejection of the bond when offered in evidence; and the opinion also says that a breach of the condition of the bond would be a set-off and good defence to the *sci. fa.* on the lien.

Attention is called to the language of TILGHMAN, C. J., in the case of Hinchman v. Graham, 2 S. & R., 169, where he decided that lumber furnished for a building, but delivered at the carpenter shop, at a distance from it, and not used in it, gave a lien. "I was once inclined to think that the lien might be restrained to the materials *actually used in the building*. But, on reflection, I find that such a construction is not warranted by the words of the law, and would operate unjustly on those who furnished the materials; for how can they tell the exact quantity that the building will require, or what control have they over the purchaser after delivery?"

In the opinion in Haley v. Proesser, *supra*, the Court said: "The object originally, in the contemplation of the Legislature, was to secure those who furnished labor or materials to a mere builder, *without knowing the owner*, or having the opportunity to secure themselves."

It has been decided, under the Act of 1845 above quoted, that one who does not contract directly with

the owner must furnish the particulars as to the nature or kind of the work done, and the kind and amount of materials furnished, as required by the 12th Section of the Act of 1836, *supra*; although one contracting directly with the owner need not give these particulars when the claim is filed on a special contract under the Act of 1845: Russell v. Bell, 44 Pa. St., 47; Lee v. Burke, 66 Pa. St., 336. A like decision was rendered in Gray v. Dick, 97 Pa. St., 142, in regard to the similar act of March 24, 1849, P. L., 675.

Such was the current of decision when the case of Schroeder v. Gal-land, 134 Pa. St., 277, came before the Supreme Court in 1890. In this case the plaintiff was a sub-contractor under Olmsted, the general contractor. In the written contract between Olmsted and the husband of the owner, made with her consent, Olmsted agreed that he would erect "and deliver over to the party of the first part, free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part, or his legal representatives, under this contract, a basement, two-story and steep-roof residence," etc. The contract contained also the following stipulations: "These payments (on the estimates of the architect), by the party of the first part, are to be made to the party of the second part, provided the wages of all artisans and laborers, and all those employed by or furnishing materials to the said party of the second part, on account of this contract, shall have been paid and satisfied; the party of the second part hereby agreeing to furnish such evidence

of payment and satisfaction if required so to do, by the party of the first part, prior to each payment.

. . . . In case the party of the second part fails to pay and satisfy all and every legal claim and demand as aforesaid against the *building*, the said party of the first part may, if he deems proper so to do, retain from the moneys due, if any, to the party of the second part, enough to satisfy such claims and demands, and if there be not enough due or coming, then the said second party covenants and agrees to pay the same. Said second party also agrees to pay sub-contractors and parties furnishing materials on account of this contract, *pro rata*, at each estimate."

The Supreme Court held that the plaintiff was not entitled to a lien.

In the opinion, GREEN, J., said: "A sub-contractor for construction is certainly bound to know the kind of building that is to be erected, the materials of which it is to be built, the price to be paid for it, and the manner and times of payment. He cannot, under a contract for the erection of a building at a cost of \$1,000, furnish work and materials to the amount of \$5,000. He cannot furnish wood as material for the erection of a building to be built of marble, or stone, or bricks. Nor can he furnish unsuitable materials, even of a kind demanded by the contract, and entitle himself to a lien therefor.

"Of course, it cannot be questioned for a moment that a sub-contractor who undertakes the construction, in whole or in part, of a building, under a contract with the principal contractor, is absolutely bound by all the plans and specifications expressed in the original

contract of the owner with the builder. He must conform to the original contract in all matters and in the minutest detail, precisely as the builder would be obliged to do. It is most obvious that he cannot depart, in any respect, either from the designs, the dimensions, the materials, the plans, shapes and sizes that are expressed in the original contract; and the reason is most manifest: He is the representative of the builder. He undertakes to perform the contract of the latter with the owner, either in whole or in part, and of course he must conform to that contract in every particular."

"There is no hardship to sub-contractors in enforcing a provision prohibiting liens against them, because they are bound to know, by necessity, all the terms of the contract made by their principal in any event, and they therefore know of the prohibition. But the owner has no opportunity of protecting himself, because he cannot know to what persons the contract, or portions of it, may be sub-let. He has done all he could do by prohibiting liens, in plain terms, in his written contract; and of that prohibition all sub-contractors are bound to know, and may abstain from contracting on such terms if they choose. We know of no good reason for giving such an extraordinary privilege to sub-contractors as the right to repudiate one of the most important terms to which their contracts are subject, or of taking away from an owner the right to insist upon the performance of his contract according to its literal terms. We take away houses and lands from their owners by means of some secret lien or trust of which they know nothing, by

applying the doctrine of constructive notice ; and it would be passing strange for us to hold that the right of a sub-contractor for part of a building is of so sacred a character that it shall not be bound by the express limitations of a written contract, under which, and by force of which, his own contract must be performed. His right of lien has no existence at common law or in equity. It is a creature of statute alone ; but the statute confers upon him no special prerogative to transcend the most familiar principles of the law, and to claim privileges which are denied to all other citizens in the determination of their contract rights. Let it be granted that a contractor, as well as the owner, has power to bind the building by a lien for work and materials ; we have never yet held that he may confer that right upon a mere sub-contractor under him when, by the terms of his own contract, he does not possess the right himself. The question is one of first impression. Heretofore it has never been before us. It is with us now, and we are at liberty to decide it in accordance with our views of right and justice, and with those principles of the interpretation and administration of contracts between citizens which we unflinchingly apply in all other cases."

The following cases have been held to be within the rule laid down in *Schroeder v. Galland* :

Benedict v. Hood, 134 Pa. St., 289. While this case might have been wholly rested upon the decision in *Scheid v. Rapp*, *supra*, the Court expressly put it upon the case of *Schroeder v. Galland*. Here the material clauses of the agreement were as follows : "And it is further agreed that the party of the

first part will not at any time suffer or permit any lien, attachment or other encumbrance, under any law of this State or otherwise, by any person or persons whatsoever, to be put or remain upon the building or premises into or upon which any work is done or materials are furnished under this contract, for such work and materials, or by reason of any other claim or demand against the party of the first part ; and that any such lien, attachment or other encumbrance, until it is removed, shall preclude any and all claim and demand for any payment whatsoever under or by virtue of this contract. . . .

"And further, the last instalment shall not be payable, unless, in addition to the architect's certificate, a full release of all claims and liens against the said building and its appurtenances and the said lot of ground, for all work done and all materials furnished in or about the construction and erection of said building, has been delivered by the party of the first part, and unless the architect shall certify that all damages or allowances which should be paid or made by the party of the first part have been deducted from the said instalment, and also a certificate from the party of the first part that all claims and demands for extra work or otherwise under or in connection with this contract have been presented to the architect. . . .

"The payment shall be made by the party of the second part in instalments, when, and in the amounts approved by the architect: *Provided*, That no instalment shall be less than three hundred dollars, and that a margin of twenty per cent. shall always remain for the final instalment ; that

is, there shall at all times be at least twenty per cent. of the work done which is unpaid for. And the sub-contractors, mechanics and material-men, except those who have executed the bond of Joseph C. Pharoh, as sureties for this contract, shall first give a release of lien for all work done and material supplied by them up to date of such payment."

Dersheimer v. Maloney, 143 Pa. St., 532. This was a lien filed by a sub-contractor. The contract between the owner and the principal contractor contained the following provisions:

"(2) Eighty-five per cent. will be paid as the work progresses on labor and materials, in monthly payments, according to and upon the estimate of the architect. The proprietor reserves the right to pay bills, deducting fifteen per cent. until completion: *Provided*, That in each case of payment a certificate shall be obtained from the architect; and, *provided further*, That in each case a certificate shall be obtained by the contractor from the clerk of the office where liens are recorded, signed and sealed by the clerk, that he has carefully examined the records and finds no liens or claims recorded against said work; neither shall there be any legal or lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished on said works."

"(7) The proprietor will not, in any manner, be answerable or accountable for loss or damage that shall or may happen to said work or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing said

works; or for injury to any person or persons, either workmen or the public, or for damages to adjoining property."

Tebay & Klingensmith v. Kilpatrick & Company, Limited, 1 Adv. Rep., 66. Here the contract between the owner and principal contractor provided that the contractor should "not sub-let the work, or any part thereof, without consent in writing of the proprietors," or owners; and also that said owners should "not in any manner be answerable or accountable for . . . any of the materials or other things used and employed in finishing and completing said works."

Wilkinson v. Brice, 1 Adv. Rep., 481. Here the agreement contained a clause identical in language with that first quoted from *Benedict v. Hood*, *supra*.

Bolton v. Hey, 1 Adv. Rep., 608. In this case paragraph IX of the contract provided for payment to the contractor upon the certificate of the architect "and upon sufficient evidence that all claims upon the building for work or material up to the time of each and every payment are discharged, or if the party of the first part shall require it, either a full or partial release, at the option of and satisfactory to the said party of the first part, of all liens against said premises on the part of all persons, if any, who, up to that time, have delivered materials for use in, or performed work upon, the said building, and before the final payment hereafter specified shall become due, to furnish to the said party of the first part, a full, complete and perfect release of all liens which may lie against the building or premises on account of work done or materials

furnished thereto, including the liens of the said party of the second part."

A supplemental agreement, also in writing and executed at the same time, provided:

"It is further agreed that the said building shall be built, finished and delivered over to the party of the first part free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part, or his legal representatives under this contract, and that the provisions of the ninth section of said contract shall not be taken to subject the said building to any liability for the payment for labor or materials furnished in and about the erection thereof, or the said party of the first part to any liability therefor, other than the payment of the contract price to the said party of the second part as therein provided."

Besides the principal case, the following cases have been held not to be within the rule of *Schroeder* and *Galland*. *Murphy v. Morton*, 139 Pa., 345, where the contract was: "The said party of the second part . . . will deliver the said houses, so completed, to the party of the first part, free, clear and discharged of and from all claims, liens of mechanics and material-men, and from any and all charges whatsoever; and, to insure on his part the performance of this part of the contract, the party of the second part hereby agrees to furnish to the owner, at each payment after the first payment, satisfactory receipts, showing that the proceeds of all preceding payments have been devoted exclusively to paying for materials and workmanship used in the construction of the said pair

of houses; and, before the last or final payment shall be due or payable, the party of the second part shall furnish the party of the first part with releases from sub-contractors and material-men, and from any and all persons having a right of lien or action against the said houses, or the property on which they are located, for any work or materials furnished and used in their construction."

Loyd & Company v. Krause & Sons, 1 Adv. Rep., 240. Here the contract contained the following clause: "Neither shall there be any legal or lawful claims against the party of the first part (the general contractor) in any manner, from any source whatever, for work or materials furnished on said work." In the preceding part of the same section of the contract, there was a provision that the last payment of the contract price need not be made until "a complete release of liens shall have been furnished by the party of the first part."

Willey v. Topping, 1 Adv. Rep., 241. Here the contractor, subsequent to his contract, but before the sub-contractor furnished the material for which he claimed a lien, had released his right to file a lien.

It is respectfully submitted that these cases are not reconcilable with each other. Take the leading case on each side, *Shroeder v. Galland* and *Murphy v. Morton*; what essential difference is there in the language of the contracts?

It will be noticed that the doctrine of *Shroeder v. Galland* is largely built upon the theory that the sub-contractor is presumed to know all the details of the contract between the owner and the general contractor, and is bound by all the

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lows' Hall v. Masser,
Murdock, 36 Cal., 298,
v. Wadsworth, 38 Cal.,

356, are cited in Schroeder v. Gal-
land as deciding "that the right of
the sub-contractor to a lien is con-
trolled by the terms of the original
contract, and he is presumed to
have notice of the terms of that
contract." These decisions were
both made under the California
Act of April 26, 1862, P. L., 384,
which Act, in its first section, pro-
vides that the lien given under it
shall only be "to the extent of the
original contract price;" and, in
Section 5, that "whenever, by the
provisions of the original contract,
the payments to an original con-
tractor are to be made by instal-
ments," those claiming a lien must
give notice to the owner before the
instalment becomes due to entitle
them to any payment out of it; and,
under Section 10, the owner cannot
anticipate any payment to the
prejudice of the lien claimants.
The point decided in Shaver v.
Murdock was that the owner could
not vary his original agreement
with his contractor so as to affect
the interests of a material-man,
without timely notice to the ma-
terial-man. Henley v. Wadsworth
decided that the owner who paid
his contractor by instalments, in
accordance with the contract be-
tween them, and without any notice
from lien claimants, was, under the
Act, protected in so doing. It is
evident that neither of these cases
support the decision in Schroeder
v. Galland.

But in Bowen v. Aubrey, 22 Cal.,
566, it is distinctly ruled that a sub-
contractor cannot claim a right of
lien where such right has been
waived by the original contractor.
CROCKER, J., on page 570, says:
"When an owner of property has
contracted with another to erect a
building, or other superstructure, or

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do any other work, or furnish materials therefor, all sub-contractors and parties agreeing to furnish labor or materials to such original contractor do so with reference to such original contract, in subordination to its provisions and to the rights of the respective parties thereto, so far as they relate to the liability of the owner or the property, or so far as they rely on such liability; and any agreement such parties may make with such original contractor is, so far as relates to the owner or the property, subject to all the terms, agreements, conditions and stipulations of such original contract; and the owner or the property cannot be held liable or bound to any extent beyond the terms of the original contract, or such new or further contract as he may make with the original contractor or the sub-contractors."

This case was decided under the California Acts of April 19, 1856, and April 22, 1858, which, like the subsequent Act of 1862, seem to contemplate that the owner can only be called upon to pay the unpaid balance of his contract price, and that the sub-contractor must know what this is and the terms of payment. See Phillips on Mech. Liens, § 272.

See also *Henry v. Rice*, 18 Mo., App., 497 (overruled in *Henry & Coatsworth Co. v. Evans*, 97 Mo., 47); *Shaw v. Stewart*, 43 Kan., 572; *Bardwell v. Mann*, 46 Minn., 285, 289.

The statute which is undoubtedly referred to in the opinion in the principal case, and indicated therein to be unconstitutional, is the Act of June 8, 1891, P. L., 225, which was passed with the idea of

restoring the law to what it had been supposed to be before the decision in *Schroeder v. Galland*. The two sections, of which this Act consists, are as follows:

"Section 1. Be it enacted, etc. That no contract which shall hereafter be made for the erection of the whole or any part of a new building with the owner of the lot on which the same shall be erected, shall operate to interfere with or to defeat the right of a sub-contractor who shall do work or shall furnish materials under agreement with the original contractor in aid of such erection, to file a mechanics' lien for the amount which shall be due for the value of such work or materials furnished, unless such sub-contractor shall have consented in writing to be bound by the provisions of such contract, with the owner, in regard to the filing of liens. Without such written consent of the sub-contractor all contracts between the original contractor and the owner, which shall expressly or impliedly stipulate that no such lien shall be filed, shall be invalid as against the right of such sub-contractor to file the same."

"Section 2. All persons contracting with the owner of ground for the erection or construction of the whole or any part of a new building thereon, shall be deemed the agent of such owner in ordering work or materials in and about such erection or construction, and any sub-contractor doing such work or furnishing such materials shall be entitled to file a mechanics' lien for the value thereof within six months from the time the said work was completed by said sub-contractor, notwithstanding any stipulations to the contrary in the contract between

the owner and the contractor, unless such stipulation shall have been consented to in writing by such sub-contractor."

It is suggested by WILLIAMS, J., that this statute is within the prohibition of Article 1, § 17, of the Constitution of Pennsylvania; and that it might also be within the prohibition of Article 1, § 10, of the Constitution of the United States. On examining the sections of the Constitutions referred to, it is evident that the only clause which could have been in the mind of the Judge is the one, in identical language in both Constitutions, prohibiting the State from passing any "law impairing the obligation of contracts." But it needs but a moment's consideration of the Act in question to see that it cannot be held unconstitutional on this ground, as the Act, by its terms, is only applicable to contracts made *after* its passage and the inhibitions of the constitutions only protect contracts made *before* the passage of the law which seeks to impair them. See *Lehigh Water Company v. Easton*, 121 U. S., 388; *Hare on Constitutional Law*, page 676.

The question then arises, is the Act in question unconstitutional on any other ground? It will here be necessary to consider for a moment the general nature of mechanics' lien laws. They are purely statutory. They have been accepted as reasonable by the people, because they seem like little more than an extension of the common law lien, which anyone has who adds to the value of a chattel in his possession by expending his labor upon it. Legally their validity does not seem to have been often called into question. The principle upon which, when at-

tacked, they have been supported is well expressed by Chief Justice SHAW, in *Donaghy v. Klapp*, 12 Cush., 440: "Before the year 1851, no one could create such a lien by a building contract, except the owner or person having an interest therein, to the extent of such interest. But by that statute one who had contracted with the owner to erect a building had power, by his sub-contract with another for the whole or part of the work, to create a similar lien on the estate in favor of such sub-contractor. . . . Before that statute took effect as law, the contract gave a lien to Hilt (the original contractor) only, which was the act of the owner charging his own estate. But under the operation of that statute, a precisely similar contract by the owner of land would give the contractor a power to bind the estate by other liens in favor of sub-contractors for labor thereon. Such liens in favor of such sub-contractors, would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be consulant, gives his irrevocable power to his contractor to charge and bind his estate; and when such power is executed by the actual making of such sub-contract for labor, it is in law the act of the owner hypothecating his own estate to the extent of the price of such labor." See also *Phillips on Mechanics' Liens*, § 65, and *Laird v. Moonan*, 32 Minn., 358. The contractor is made the general agent of the owner, with authority to bind, not the owner personally, but the building, in favor of a sub-contractor, by a lien for reasonable and suitable materials, although (in the absence of

an express statutory provision) the aggregate of the sub-contractors' liens exceeds the contract price. Such powers are, under the law, implied to have been given to the contractor by the owner. But where the owner in his contract has expressly stated that he gave the contractor no such powers, can the Legislature declare that the contractor shall, nevertheless, as to sub-contractors and material-men, be held to have such powers? And this, even where the sub-contractor has actual notice and full knowledge of this provision in the contract between the owner and the original contractor; for, in the statute in question, the only way in which the sub-contractor can be held by such a provision in the original contract is by his consent thereto in writing.

The constitutional provisions under which this Act will most probably be attacked, are the clause of the Fifth Amendment to the Constitution of the United States, which provides that "No person shall be deprived of life, liberty or property, without due process of law;" and the First Section of the First Article of the Constitution of Pennsylvania, which classes among the inherent and indefeasible rights of all men, that "of acquiring, possessing and protecting property." Certainly it may be argued with considerable force that the effect of this Act will be to limit the owner's enjoyment of real estate; and to put it out of his power to make the ordinary and useful improvements to his property without subjecting himself to the risk of having it burdened with debts which he did not personally contract, for improvements for which he has fully paid, and which debts were made a lien upon the

property by the acts of one to whom he had expressly refused to give any power to pledge the property for the payment of these debts, and of which refusal the persons to whom the debts are owing had full knowledge when they contracted them. This seems like carrying the doctrine of implied agency beyond all proper limits.

But why invoke the doctrine of agency at all? Cannot the Legislature say that every building erected with the authority of the landowner shall be subject to a lien for work and materials in favor of those who furnish them, which lien they alone can waive? "As soon as owners of lots ceased to be their own builders, they put it in the power of the persons employed by them to occasion losses to mechanics and material-men which they ought not to bear; and it was to remedy this mischief that the Legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just but a convenient one. Whether the builder be the *agent* of the owner or an *independent contractor*, his appointment to the job creates a confidence in him which was not had before; and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning it." GRIBSON, C. J., in *White v. Miller*, 18 Pa. St., 52. This case is well worth careful reading.

Probably the Act would be free from objection if it had provided that the lien in favor of the sub-contractor should not exist where the original contract stipulated against such liens and was filed or recorded in some public office. See

Kellog v. Howes, 81 Cal., 170. But under the statute as it reads, there is no possible way for the owner to prevent liens attaching, except by obtaining the written consent of persons who may be absolutely unknown to him until after the mischief has been done.

Whether or not such an Act will be held constitutional, it seems to the writer, must depend very much upon what the Court before whom the Act comes shall deem to

be good public policy. If the Court considered that the lien of the mechanic is something to which he is reasonably entitled, and which tends to the well-being of the community, the statute will probably be upheld: *Henry & Coatsworth Co. v. Evans*, 97 Mo., 47; *Merrigan v. English*, 5 L. R. A., 37; *Colpetzer v. Trinity Church*, 24 Neb., 113; *Albright v. Smith*, 51 N. W., 590. *Contra*, *Spry Lumber Co. v. Trust Co.*, 77 Mich., 199.

BENJAMIN H. LOWRY, *Philadelphia*.

EDITORIAL NOTES.

By W. D. L.

THE NEW JURISDICTION OF THE SUPREME COURT OVER POLITICS. — *Boyd v. Nebraska ex rel. Thayer*, decided by the Supreme Court of the United States on the first of last February, and digested in our abstracts of cases for this number, excited considerable interest on account of the political importance of the result, since the decision involved the question of who had the right to the Governorship of Nebraska. It will probably be remembered, however, not on this account, but because it meets and decides for the first time an important question relating to the jurisdiction of the Supreme Court. The facts of the case were briefly these :

The Constitution of the State provided that no one was eligible to hold office in the State who had not been for two years previous to his election a citizen of the United States. James A. Boyd received the highest number of votes at the fall election of 1890, but after his inauguration he was ousted from his office by the Supreme Court of the State on the ground that he had not been for the two years previous to his election a citizen of the United States. Boyd then appealed to the Supreme Court of the United States. The Chief Justice, Mr. Justice

FIELD dissenting, delivered the opinion of the Court, and upheld the jurisdiction on the ground that a right claimed under a *statute of the United States* is drawn in question, and that the decision of the State Court had been adverse to the claimant. He says: "Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial court or otherwise. But when the trial is in the courts, it is 'a case,' and if a defence is interposed under the Constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of the State, this Court has jurisdiction by writ of error."¹ The Court here simply follows the opinion of Mr. Justice BROWN in the case of *Missouri v. Andriano*.² In that case the question in dispute was the right to act as Sheriff of a county in Missouri. Under the law of the State no one but a citizen of the United States could hold office in the State. The Supreme Court of the State, reversing the court below, held that the respondent, whose citizenship was in question, was a citizen of the United States, and, therefore, entitled to the office. The decision being in favor of the right claimed, the Supreme Court of the United States dismissed the writ of error, but Mr. Justice BROWN distinctly said that, had the decision of the Supreme Courts of the State been against the right claimed, they would, without question, have had jurisdiction.

The text of the dissent of Mr. Justice FIELD in the Nebraska Governorship case has not yet been published, and we are unable to state the exact grounds on which it is placed.

The question presented is one of great interest, and we cannot but regret that the Court did not go more fully into the grounds of their decision. The argument against the jurisdiction which will occur to every one is briefly this: The State alone has the right to prescribe the qualifications necessary to hold public office under the State gov-

¹ 143 U. S., 160.

² 138 U. S., 496, 499.

ernment. This right is exclusively in the State Legislature. To say that the interpretation of laws relating to the qualifications of office-holders in the State can by any possibility involve the construction of a law of Congress, is impossible. When the State Constitution says that one of the qualifications for holding office in the State shall be citizenship of the United States, it impliedly adopts the naturalization laws of Congress as part of its laws relative to those qualifications. The construction of the laws of Congress by the State Courts in a case involving the right of one to hold office in the State, is not nor cannot be the construction of the laws of the United States, but of the State. To put an illustration of this argument: A State passes a law which requires the Governor of the State to have the qualifications which are necessary for one to be President of the United States. Would a decision by the State Courts, that A. B., who had received the highest number of votes, was thirty-four years old, and, therefore, ineligible to hold the office of Governor, be reviewable in the Supreme Court of the United States? Would not the law requiring the Governor to be thirty-five years of age be a law of the State; and its interpretation and application the exclusive province of the State Judiciary?

The argument in favor of the jurisdiction of the Supreme Court appears to us to be necessarily somewhat as follows: The State, in requiring the same qualifications for its office-holders as are required in order that one may become a citizen of the United States, places a qualification for office which can only be determined by the Federal Courts. Thus the question whether Boyd was entitled to the Governorship of the State of Nebraska could only be determined by first ascertaining the fact, to wit: Was he a citizen of the United States? The Federal Courts alone are competent for the final and authoritative ascertainment of this fact. To leave its determination to a State tribunal would be to deprive the citizens of the State and of the United States of the equal protection of the laws, because it would be to say that anyone whom the judges of the State thought was not eligible for office, could not hold

office. In other words, the State, by making as one of their qualifications for holding office the fact that one has complied with the laws of the United States, has necessarily surrendered to the Federal Courts the jurisdiction of the question whether any individual has complied with the law.

The importance and far-reaching consequences of the decision cannot be overestimated. There is not a State in Union which does not require its office-holders to be citizens of the United States. The decision, therefore, brings into the Supreme Court a great many political controversies concerning rights to a political office in a State. Concerning the soundness of the decision we do not venture an opinion. But anything which adds to the possible number of the political controversies in the Supreme Court, and especially State political controversies, is, from a practical standpoint, to be sincerely regretted.

A NEW STATE TAX.—No sooner is one system of State taxation on the subjects beyond its jurisdiction, or on interstate commerce, upset, then another scheme is concocted by the members of the bar, or the committees of State legislatures. One of the most ingenious ever devised is embodied in the State tax law of North Carolina. The laws of that State, which have been upheld as constitutional both by the Federal Court for the Northern District of North Carolina, and the Supreme Court of the State, tax all grocers, druggists, etc., on the gross purchases made by them of certain articles, whether within or without the State. The tax is called a License Tax for the permission to carry on the drug or other business. The Supreme Court of North Carolina upholds the tax on the ground that it is one on the drug business which is carried on wholly within the State. It may be objected, however, that the fact that a business is carried on wholly within the State does not prevent it from being part of interstate or foreign commerce. A shopkeeper must buy or make before he can sell. No one would pretend that one can be taxed on all that he makes outside the State, before he brings his products

within the State. Can he be taxed on what he brings in for the purpose of sale? *Brown v. Maryland*, and *Low v. Austin* completely answer that question in the negative. By what ingenuity of logic then can a State tax the value of those things purchased for sale in the hands of him who has purchased them, even before he has imported them? It may be said that the tax is on the man, not on the goods. But it may be asked, what better way to tax goods, than to tax the owner, as in this case, according to the value of the goods as gauged by the amount of money he paid for them?

THE QUESTION OF NEGLIGENCE AND THE APPELLATE COURTS.—In the case of the Grand Trunk Railway Co. *v. Ives*¹ the Supreme Court, through Mr. Justice LAMAR, has made a very careful review of the subject of the negligence and contributory negligence. The law of negligence is, or ought to be, simple. There are two, and only two, fundamental principles. First, that where there are two persons, and one is acting with ordinary care, and the other is not, and as a result of such a lack of care he hurts the former, he is responsible for the damage. Second, if both were in fault, that is if neither observed ordinary care, neither can recover from the other.² It is evident that what is ordinary care varies with each case. Ordinary care in a child would not, though in exactly similar circumstances, be ordinary care for a man.³ One set of facts can never be a precedent for the determination of any other set of facts. "Ordinary care" in any particular instance is a fact, and not a law relating to those facts.⁴

If, therefore, there is one thing which one would imagine that under our system of jurisprudence would be a fact for a jury, and not law for the court, it would be the determination of whether there was "ordinary care"—

¹ 144 U. S., 408, decided April 4, 1892.

² *Butterfield v. Forrester*, 11 East., 60.

³ *Robinson v. Cone*, 22 Vt., 213; *Amer. & Eng. Ency. of Law*, Vol. 16, p. 398; *Title Negligence*, 3.

⁴ What constitutes due care must depend upon the circumstances of the case: *Colt, J.*, in *Gaynor v. Old Colony R. R.*, 100 Mass., p. 214.

under the peculiar circumstances of the case—exercised by a defendant charged with negligence. Yet we constantly hear that negligence is a *mixed question* of law and fact. What is meant by this does not always seem to be clear in the minds of those who employ the term.¹ The term itself is misleading. It is employed in reference to negligence in two ways. Stepping on a railroad track, not at a crossing, has been presumed to be contributory negligence by the court.² Just as in some States, not complying with statutory regulations for the running of trains through the city, is in law presumed to be negligence,³ though as applied to a particular road or a particular crossing, no one would say that common prudence required one not to go on the tracks after inspecting the road, or to run at a slow rate of speed. And yet if either of these facts appear in evidence the case would have been taken from the jury by the court. The court is not supposed to consider whether the action of either party was *per se* negligence. The term “mixed question,” therefore, is very inapplicable. It is no more “mixed” than any other application of law to facts. Again, the second sense in which this term is used is where it is intended to convey the idea that the court must first decide whether there is sufficient evidence for the jury to say whether there is negligence on the part of the plaintiff or defendant, before allowing the jury to decide whether there is negligence. As in the former case there is no question of fact, so in the latter case there is no question of law. The court, in taking a case from the jury because there is not evidence enough to warrant a jury in finding negligence or ordinary care, simply decides a question of fact, acting as a thirteenth and supervising juror.

The use of the word “mixed” is, and always has been, confusing, and it is not extraordinary that it does not appear once in the opinion of the Supreme Court in the case we

¹ See *op. of* CHRISTIANCY, Ch. J., in *Lake Shore and Mich. R. R. Co. v. Miller*, 25 Mich., p. 299.

² *Mulhessin v. Delaware R. R. Co.*, 81 Pa. St., 366.

³ *Schlereth v. Missouri Pac. Ry.*, 96 Mo., 509; *Virginia Ry. Co. v. White*, 84 Va., 498.

have referred to. On the other hand, Mr. Justice LAMAR gives a very clear explanation of the principles which should govern a court in deciding when to leave a question of negligence to a jury. When a given statement is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is even considered to be one of law for the court.¹ It is necessary that courts should exercise some control over the findings of a jury. When the verdict is such that all men of common sense would agree that the verdict is against the weight of evidence, then it is the duty of the court to set that verdict aside and grant a new trial. Surely, then, there is much to be said in favor of the position taken by Mr. Justice FIELD, that where if the jury brought in any but one verdict, the court would be obliged to set that verdict aside ; it is then a matter for the court's discretion, whether they shall direct a verdict for the defendant.²

The only difficulty—and it is a serious one—in allowing a judge to direct a jury on the evidence to bring a specific verdict, is the fact that the evidence is seldom plain and undisputed. It may be the province of the trial judge to act as a thirteenth juror in drawing a conclusion of fact from the facts in evidence, but there is no apparent necessity for his acting in that capacity to assist the jury in determining

¹ Op., p. 417.

² Op. in *North Penn. R. R. v. Com. Bk.*, 223 U. S., p. 733. He says : "It would be an idle proceeding to submit the evidence to the jury when they could justly find only one way." Citing *Anderson County Commissioners v. Beal*, 113 U. S., 227, 271, Ch. J. CHRISTIANCY in *Lake Shore & Mich. R. R. Co. v. Miller*, 25 Mich., p. 292, puts the same thought in a slightly different way when he says: "The laws of nature and of the human mind, at least such of them as are obvious to the common comprehension of mankind, as well as the more obvious dictates of common sense and principles of human action—which are assumed as truths in any process of reasoning by the mass of sane minds—constitute part of the law of the land, and may, and must, be assumed by the court, without being found by a jury; indeed, the finding of a jury which should clearly disregard them, should itself be disregarded by the court."

what facts are in evidence. Therefore, if binding instructions on questions of the proper conclusion of fact from the facts in evidence are given by the judge, he should put the case in a hypothetical manner: "That if the jury believe, etc."¹

Negligence is a question of fact, but like all other questions of that character, while properly a question for the jury, they should not be allowed to disregard reason and common sense.

Admitting, therefore, the duty of the trial judge to refuse to receive a verdict against reason and common sense, or even to direct the verdict of the jury where only one verdict can be given from the undisputed evidence, it does not make the question of negligence any less a question of fact. And if negligence or ordinary care is a pure question of fact with absolutely no legal test of what is negligence or ordinary care in a particular case, why make the refusal of a judge to grant a new trial, because the appellant thinks the verdict was against the evidence, and that only one verdict—the one in his favor—could have been rendered by reasonable men, the subject of a writ of error to a higher court?

Such an appeal can, confessedly, solve no question of law. The discussion, while burdening the reports, as the innumerable accident cases do, can only reiterate the long-settled fundamental principles of the law of negligence, but can never shed a ray of light on the decision of any other case. The reason for this is evident. It is a question of fact, not of law, which has been appealed. The Supreme Court retry the case on the record, a task for which, having failed to hear the evidence given, they are by no means as well fitted as the trial judge.

The purpose of an appellate court is not to delay justice, but to settle the law, and to see that inferior tribunals act in accordance with the law. And yet where, perhaps, the trial judge has made no error in law, the appellate tribunal is asked to go over the evidence given in the case, because the appellant's view of the evidence is not the same as the

¹ See *op. WELSH, J.*, in *Marietta Rd. Co. v. Pecksley*, 24 O., 654.

jury's. The result is that every accident case, which is not compromised, is appealed in the hope that an appellate retrial of the facts of the case will result in a reversal of the judgment. Thus a plaintiff is kept from the enjoyment of the fruits of his verdict without any corresponding gain to the community arising from the likelihood of a more just result. No matter how able the judge who tried the case, there is certain to be an appeal ; which the appellate court must take time to listen to, because it demands a review of all the evidence. This invariable delay for the purpose of delay throws a contempt on the administration of justice.

But, to the legal mind, perhaps the most serious consequence of allowing appeals in questions of fact, is the tendency observable in all the courts, except such carefully selected tribunals as the Supreme Court of the United States, and some of our State Supreme Courts, to regard questions of negligence in particular cases as questions consisting mainly of legal presumptions. In every appeal the briefs of counsel are burdened with cases whose facts are, or are claimed to be, somewhat similar to the facts of the case argued and in which certain decisions were made. The courts in their turn—the habit of looking to precedents being strong—in their opinions cite their prior opinions in cases with approval, or distinguish their former opinions from the one before them; so that what was at one time a mere opinion as to the proof in a particular case, tends to become a settled legal presumption and part of a so-called law of negligence. It may be affirmed with confidence that nothing so surely tends to defeat justice as to clog the determination of the question of whether A. B. or C. in peculiar circumstances used *ordinary care* or *reasonable care*, as a text-book full of arbitrary legal presumptions of what is ordinary and what is reasonable care. It is only the obsolete system of the schoolman of the middle ages reinstated.

BOOK REVIEWS.

THE FEDERAL POWER OVER COMMERCE. BY WILLIAM DRAPER LEWIS, LL.D., OF THE PHILADELPHIA BAR. University of Pennsylvania Press, Philadelphia, 1892.

The writer of this monograph takes the ground that the extent of the constitutional power of Congress to regulate commerce among the several States can only be determined by an examination of the decisions of the Supreme Court of the United States interpreting the commerce clause of the Constitution; and the book itself is an excellent though compendious review of those decisions, particularly so far as they define the word "commerce," the nature of the Federal power over it, the effect of the commerce clause upon the general legislative power of the States, their right of taxation, and their police power. Each branch of the general subject is considered historically, and the whole is followed by a most convenient index of decisions, in which the cases are classified according to their different subjects.

The commerce clause of the Constitution has perhaps given rise to more litigation than any other, except that defining the judicial power of the Federal Government, and that inhibiting States from passing laws impairing the obligation of contracts. While the general limits of this power may be regarded as conclusively settled, there is still much uncertainty with respect to the authority of the States over commerce not wholly internal, particularly in respect to their police power, and their power to tax the subjects of interstate commerce. Even since this book was published, and during the term which has just closed, several important cases have been decided, which are claimed by some to qualify to a certain extent the principles laid down in prior cases. Thus in *Maine v. Grand Trunk Railway Co.*, 142 U. S., 217, it was held, though by a bare majority of the Court, that a State statute requiring every railroad within the State to pay an annual tax for its franchise, to be determined by the amount of its gross transportation receipts; and further providing that, when ap-

plied to a railroad lying partly within and partly without the State, the tax shall be equal to the proportion of the gross receipts in the State, did not conflict with the Constitution of the United States. In this case Mr. Justice BRADLEY made his last public utterance from the bench in a strong dissent, concurred in by three other Justices, taking the position that the laying of a tax upon the gross receipts of a company, including receipts for interstate and international transportation, was substantially a taxation of the revenues derived from interstate commerce, which had been held in many previous decisions to be unconstitutional; citing *Philadelphia Steamship Co. v. Pennsylvania*, 112 U. S., 326, and several other cases. The majority of the Court, however, was of the opinion that this was an excise tax upon the corporation for the privilege of exercising its franchises within the State, and that the rule of apportioning the charge to the receipts was reasonable, and likely to produce the most satisfactory results both to the State and the corporation taxed. A distinction was drawn, which to the minority of the Court seemed to be unsound, between a levy upon the receipts themselves, and a reference to them simply as a means of ascertaining the value of the privilege conferred.

In the *Horn Silver Mining Co. v. New York*, 143 U. S., 305, it was held, Mr. Justice HARLAN alone dissenting, that a statute of New York imposing a tax upon the corporate franchise or business of every corporation organized under a law of any other State, to be computed by a percentage upon its whole capital stock, was not an unconstitutional interference with interstate commerce, when applied to a manufacturing corporation organized under the laws of Utah, and doing a greater part of its business out of the State of New York, but doing a small part of its business within such State.

The principle involved in the case of *Munn v. Illinois*, 94 U. S., 113, which has given rise to so much controversy, was carefully reconsidered and adhered to in the case of *Budd v. New York*, 143 U. S., 517, although in this case, as in the *Munn* case, there was a dissent by three of the Justices.

In *Ficklen v. The Taxing District*, unreported, a statute of Tennessee, imposing upon brokers a tax measured by the amount of capital invested or used in their business, was held to be proper, although the business done by the broker in question was in the purchase of cotton for customers residing outside of the State. The gist of the decision was, that as the State has the right to tax occupations, where a resident citizen engaged in such business, the fact that the business done chanced to consist wholly or partly in negotiating sales between resident and non-resident merchants, did not necessarily make the tax one upon interstate commerce. The case was distinguished from *Robbins v. Shelby County Taxing District*, 120 U. S., 489, in the fact that the tax in that case was imposed upon drummers and all persons not having a regular licensed house of business in the district, and it was held as against non-resident drummers to be an unlawful interference with interstate commerce.

In the *Lehigh Valley R. R. Co. v. Pennsylvania*, a tax upon receipts for transportation between places in Pennsylvania, over lines partly in Pennsylvania and partly in another State, that is to say, passing out of Pennsylvania into other States, and back again into Pennsylvania in course of transportation, was lawful. In this case the Lehigh Valley Company operated a line from Mauch Chunk to Philadelphia, by the way of a line entering New Jersey at Phillipsburg, and running thence by way of Trenton to Philadelphia. This was held to be internal commerce only, and the fact that a part of a continuous transportation was performed outside of the State did not affect the character of the traffic.

Finally, in the *Interstate Commerce Commission v. B. & O. R. R. Co.*, the Supreme Court entered, for the first time, upon the consideration of the Interstate Commerce law, a statute which is likely to be fruitful of litigation, and held that the practice of issuing a single ticket for the transportation of ten or more persons at a reduced rate from the ordinary passenger fare was not an "unjust discrimination" or "an undue or unreasonable preference,"

within the meaning of Sections 2 and 3 of the Interstate Commerce law, and was, therefore, legal. This practice originated with the issuing of tickets to the managers of theatrical and operatic companies for the transportation of their entire troupes, and has become general throughout the country. The decision was strictly within the line of the construction given to the English traffic acts by the courts of the United Kingdom, and the Court carefully excluded the question of discrimination as applied to the transportation of freight. Curiously enough, this decision is seized upon by a portion of the newspaper press as indicating the hostility of the Court to the Interstate Commerce law, when nothing could be further from this than the language of the opinion.

The difficulties surrounding the interpretation of the commerce clause of the Constitution are apparent, not only from the number of decided cases, and the multiplicity of questions dependent upon this clause, but from the fact that the members of the Court itself have never been, and in the nature of things probably never will be, entirely harmonious in their views. Rarely has an important case, involving the construction of this clause, been decided without a dissent from one or more members of the Court, and the most that can be hoped for is the determination of each question as it arises, and the gradual settlement of principles as they can be extracted from these cases.

The book of Mr. LEWIS contains an accurate statement of these principles so far as they can be considered settled by the adjudications of this tribunal.—H. B. BROWN.

CORPORATIONS IN PENNSYLVANIA. By WALTER MURPHY, author of "PARTNERSHIPS, ETC., IN PENNSYLVANIA." Two volumes. Philadelphia, 1891. Rees Welsh and Company.

In these two volumes Mr. MURPHY presents to the profession a digest of Pennsylvania decisions on the law of corporations, as well by County Courts as by the Supreme Court of the State. The work includes an elaborate index, which is in itself a digest, for it includes under the appro-

priate headings a summary of the matter set forth at greater length in the text. One of the most valuable features of this index is the chronological list of Acts of Assembly from 1713 to 1890, the date of each act serving as a caption of a paragraph of a summarized decision in construction of the statute. In his preface the author expresses the hope that his work may be useful. There is no doubt that this hope will be realized; with Mr. MURPHY'S digest in hand the lawyer will have little difficulty in finding what the courts have said on a given point. The system of references and cross-references is reasonably good, and the division of topics is on the whole satisfactory. What we call "Corporation Law" is as yet a heterogeneous mass, and it would be unfair to criticise the maker of a digest on the ground that his classification is not always logical. There is in this work perhaps too strong a tendency to place implicit reliance in the syllabus of our reported cases as a faithful exponent of the decisions. An examination reveals a few instances in which the opinion of the Court in a digested case does not fully sustain the reporter's syllabus.

On the whole the digest is a good one. It is convenient in size and the general "make-up" of the book is excellent. But the book is only a digest; we cannot assent to the author's statement that it "possesses all the qualities appertaining to a treatise or text-book on the subject of corporations." It contains the materials for a treatise, but then, too, the census tables contain materials for an essay on population.

G. W. P.

LEADING CASES SIMPLIFIED. A COLLECTION OF THE LEADING CASES OF COMMON LAW, LEADING CASES IN EQUITY AND CONSTITUTIONAL LAW, AND LEADING CASES ON CRIMINAL LAW. Three volumes in one. By PROFESSOR JOHN D. LAWSON. Bancroft, Whitney Company, San Francisco, 1892.

This is not a new edition of Professor LAWSON'S book. The three volumes in which the work originally appeared are now bound together and sold as one volume. This renders the whole more convenient to handle and, we presume, effects a reduction in the price. The change in form,

if not in substance, renders it fitting that something should be said concerning the work itself. In his preface to the first volume the author sets forth his objects as follows: "In this little book I have aimed at these results: (1) 'To give the student a collection of the acknowledged leading cases on the common law.' (Subsequently the author has added Equity, Constitutional and Criminal Law.) (2) "To present these in a style which shall arrest his attention and render it possible for him to acquire their principles readily, and fix those principles in his mind unincumbered by unimportant and sometimes unintelligible facts."

Of the last object it may be said that no praise is too high for the many merits—there are few defects—of Prof. LAWSON'S style. Though the cases are presented in as humorous a light as possible, to use the author's own words, "humor has never been indulged in at the expense of truth."

Since the publication of the "Comic Blackstone," the idea that the dry statements of law can be presented to the student coated with the sugar of absurdity, is very prevalent, and Mr. LAWSON'S book is partly a justification for it. He has shown that many cases can be made funny without sacrificing either the statement of the facts or the principles of law. Of course all discussion of the merits and defects of a principle is necessarily eliminated. But his reports also prove that the facts of many cases are invariably dry. It is seldom that the (humorous?) report of any case on constitutional law will raise a smile on the most risible. In those cases which are really funny the humor will be appreciated much more by a lawyer, who thoroughly knows the cases, and therefore requires no effort to grasp the principles, than by a layman, who reads for the purpose of self-improvement. In fact, one may venture to predict that the value of the work is chiefly as an aid to one desiring to review, and fix in his mind, the principles of the law originally learned in the lecture-room, through text-books, or from the reports. For this purpose, it is well worth reading, not only by the student who desires to prepare for an examination, but by the lawyer who wants to refresh his memory

in the easiest and pleasantest way, of those cases which best illustrate the principles of law.

Prof. LAWSON has published the Six Carpenters Case and other reports in rhyme by the "Apprentice of Lincoln's Inn." This fact alone would render the book well worth owning.

Concerning the author's first object, it may be said that there are two ways in which a student can obtain a knowledge of the principles of law: Through a direct examination of the principles themselves as stated in the textbooks, or through a review of the reports of cases which illustrate those principles. A mixture of these two ways is the method which has been adopted by most compilers of "Leading Cases." A case is given, and then the principle, together with its modifications, is discussed. Concerning the merits of the system nothing need here be said. Minds are not all cast in the same mould. To many the notes on Smith's "Leading Cases" have proved a mine of information, to others a hopeless labyrinth of confused knowledge. Prof. LAWSON has adopted a radically different principle in his "Leading Cases."

The reader will not only find the fifty or sixty cases which are ordinarily spoken of as leading, simply because they, or the notes which commentators have written to them, are constantly referred to in the opinions of the courts, but some two hundred and fifty additional and carefully selected cases. In fact, many of the cases reported, especially from the American courts, can hardly be called leading, in the sense that they are widely known by the profession. This, however, does not detract from the merits of the work, which is rather a collection of cases in illustration of the leading principles of law, than simply a collection of acknowledged leading cases. The large number of cases enables the compiler not only to illustrate a principle, but often to show its leading modifications without resorting to notes. Thus, in illustrating the law of contracts we have, under the head of "Consideration," not only the rule that forbearance to sue is a sufficient consideration, shown by the case of *Hockenbery v.*

Meyers,¹ but the modification that there must be a legal cause of action is illustrated by the report of *Palfrey v. Portland R. R. Co.*² In several instances two or three cases illustrating the same rule are given. Thus, under the head of "Contracts by Post," are reported *Adams v. Lindsell*,³ *Taylor v. Merchants' Fire Ins. Co.*,⁴ and *Household Fire Ins. Co. v. Grant*.⁵

Though there is only one note in the report of sixty odd cases on contracts, one who fixes these cases in his mind will have a very fair idea of the subject. The whole affords, we believe, a much clearer view of the law than could possibly be gained from reading elaborate notes to a smaller number of reported cases.

But all branches of the law are not capable of such simple illustration. The cases illustrating the judicial interpretation of the Statute of Frauds, for instance, give one but an inadequate idea of the confusion of thought which has resulted from the attempt to construe what ought to have been made a part of the law of evidence, as a codification of the substantive law of contracts.

In reporting equity cases, Prof. LAWSON seems to have given up the attempt to give, through the reports of decisions, an adequate outline of the law. Thus, in the very commencement, under the head of Uses and Trusts, in the attempted report of *Tyrrel's case*⁶ he says: "The facts need not be given here, for it is sufficient for the student to remember only the important principle it decides. . . . *There cannot be a use upon a use.*" Then follows a note on the Statute of Uses and the doctrine of Trusts. In the same way, it has been found necessary to add a note to almost every equity case in order to give the reader any conception of the law at all. It may be said that the value of the work falls in proportion to the increase in the number of the notes. More cases and less notes would have been advisable.

Dealing with Constitutional law, Prof. LAWSON seems

¹ 34 N. J. L., 346.

² Barn & Ald., 681.

³ 4 Ex. Div., 216.

⁴ 4 Allen, 55.

⁵ 9 How., 390.

⁶ Dyer, 155 a.

to find the same difficulty of illustrating the law as it exists to-day through concise reports of cases. It may be suggested that one of the principal reasons for this is the fact that in this branch the same care in selection of cases, which, with accuracy, conciseness and clearness of statement, is the chief merit of the rest of the work, has not been displayed. Constitutional law has undergone so many modifications of late years, that many cases, once justly called leading, no longer illustrate the present position of the Court.

From the fact that the report of the case of *New York v. Miln*¹ and the report of the *License Cases*² are both retained, it is evident that the work has not been revised since 1882, when the last volume was published. Such a revision would have eliminated these two cases, as it is extremely doubtful whether the former expresses the law as it exists to-day, and the latter has been expressly overruled.³ The logical arrangement of the subject, however, largely redeems this part of the work from these serious defects.

W. D. L.

A TREATISE ON THE LAWS OF INSURANCE; FIRE, LIFE, ACCIDENT, MARINE; WITH A SELECTION OF LEADING ILLUSTRATIVE CASES, AND AN APPENDIX OF STATUTES AND FORMS. BY GEORGE RICHARDS, OF THE NEW YORK BAR, AND LECTURER ON INSURANCE LAW IN THE SCHOOL OF LAW OF COLUMBIA COLLEGE. New York and Albany: Banks & Brothers, 1892.

This is a book of peculiar interest and importance. It is an admirable work to put into the hands of students, for whose use it is primarily designed. It will also be of service to the profession, as well on account of its clear statement of important principles, as by reason of its satisfactory discussion of the law applicable to standard fire and other policies now in common use. It may, therefore, justly be called an important book, and it is an unusually interesting book, because it represents "the result of an effort to combine the advantages of the two more prominent

¹ 11 Pet., 102.

² 5 How., 504.

³ *Leisy v. Hardin*, 135 U. S., 100.

methods in use for teaching law, commonly known as the text-book and case systems, the comparative merits of which have recently aroused widespread and thoughtful attention." Such is the author's own statement in the opening lines of his exceptionally thoughtful and well-reasoned preface. Mr. RICHARDS contrasts the treatise or text-book system of instruction with the case-book system, characterizing them as follows : " The former method is more synthetic and abstract, the latter more inductive and concrete. The former is more theoretical, and, in a sense, more scientific; the latter, while embracing a narrower range of decisions, is, with respect to the particular adjudications and principles which it includes, more definite, practical and thorough." Believing that each of these methods " possesses points of superiority over the other," Mr. RICHARDS has endeavored in this work to combine the advantages of both systems, with the hope, as we suppose, that as a result of the combination the disadvantages of both will be eliminated. Accordingly, the second part of the book consists of a reprint from the original report of leading cases illustrative of the principles discussed. These cases, between fifty and sixty in number, are carefully selected and are grouped under chapter headings corresponding with those in the first part of the work. When these cases are read in connection with the chapters to which they correspond, the advantages of Mr. RICHARDS' method of combination become evident. The dangers and disadvantages of the text-book system are, to a great extent, avoided, while the greatest objection urged against the case system, that the student is induced " to pin his faith to isolated decisions," is altogether overcome.

On the other hand, the combination method, as exhibited in this book, does not do full justice to the case system. It is impossible, in the nature of things, that the most characteristic advantages of that system should be here exhibited. The reader does not see the law grow before his very eyes as he does when he peruses a larger volume of well-selected cases arranged in chronological order. He cannot, under the combination method any more than un-

der the text-book system, study the *past* of the law in the way in which he is compelled to study its *present*. We have no option as to the way in which we shall keep pace with the present development of legal principles ; we must read such cases as we deem important as fast as they are decided—day after day—year after year. It is, indeed, true that we cannot say with certainty of a given case, "This decision will be law a century hence"—while we can assert, without hesitation, of many a case a century old that it is not law to-day. But the accuracy of our judgment respecting a new decision will approach certainty if our legal knowledge has, so to speak, "grown up with the law"—if by watching the development and evolution of principles we have become imbued with the genius of the law. By means of the case system we become familiar with the methods by which results are reached as well as with the results themselves. We can not only survey the completed structure, but we can mark the progress of the work and scrutinize the process of fitting stone to stone; and it is to be observed that the stones which the builders have refused possess an educational value as well as those which have been accepted ; so that overruled cases are only less instructive than those which represent the law to-day.

The advocate of the text-book system, and even Mr. RICHARDS himself, might reply to these observations in the language of a very eminent English judge of our own day. In the introduction to his *Digest of the Law of Evidence*, SIR JAMES FITZJAMES STEPHEN uses the following language :

"LORD COKE wrote, 'It is ever good to rely upon the books at large; for many times *Compendia sunt dispendia*, and *Melius est petere fontes quam sectari rivulos*.' Mr. SMITH chose this expression as the motto of his 'Leading Cases,' and the sentiment which it embodies has exercised immense influence over our law. It has not, perhaps, been sufficiently observed that when COKE wrote, the 'books at large', namely the 'Year Books' and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by

the Council of Law Reporting; and that the *compendia* (such books, say, as Fitzherbert's 'Abridgment') were merely abridgments of the cases in the 'Year Books' classified in the roughest possible manner, and much inferior both in extent and arrangement to such a book as Fisher's 'Digest.' In our own days it appears to me that the true *fontes* are not to be found in reported cases, but in the rules and principles which such cases imply, and that the cases themselves are the *rivuli*, the following of which is a *dispendium*. My attempt in this work has been emphatically *petere fontes*, to reduce an important branch of the law to the form of a connected system of intelligible rules and principles." To this reply may be made that if any such work could be completely successful, Mr. Justice STEPHEN'S Digest would be. But a most thorough test of that truly wonderful book, made within the writer's own observation, has demonstrated that a student who has thoroughly mastered its clear and concise statement of principles is, nevertheless, incapable of applying them successfully to the solution of a case stated, unless he has studied—not merely syllabus-examples, like those which Mr. Justice STEPHEN appends to his text—not merely "illustrative cases," like those which Mr. RICHARDS prints—but the very cases, in their chronological order, from which, as from a *fons splendidior vitro*, Mr. Justice STEPHEN has deduced the principles themselves.

But, after all, even if such a criticism has validity, it amounts to nothing but this—that "Richards on Insurance" is not a perfect book, because it does not possess all the advantages of every conceivable method of teaching law and avoid all the disadvantages of those methods. The fact is, as a most thorough examination has convinced us, that the book is a careful and scholarly presentation of the subject. It is clear and concise, and even the more abstruse questions discussed are treated in such a way that they will be readily understood by the merest tyro. It is to be regretted that the work is not provided with an index. The table of contents, though full, does not take its place, and the value of the treatise as a book of reference is somewhat impaired by the omission.

G. W. P.

ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions.

BY

WILLIAM WHARTON SMITH,
HENRY N. SMALTZ,

HORACE L. CHREYNEY,
FRANCIS COPE HARTSHORNE,

JOHN A. MCCARTHY.

BANKS—INSOLVENCY—CHECK FOR COLLECTION—RIGHTS OF DEPOSITOR.—Certain checks, marked "for deposit," were deposited with a bank and were regularly credited upon the pass-book of the depositor. There was no agreement that checks when deposited should be considered as cash, or that the depositor could draw on them before collection, but it was the custom of the bank after the close of each day's business to credit all deposits at their face value, and in case a check should be returned from the clearing-house uncollected, to charge the depositor with the check and thus cancel the credit. It was also the practice of the bank to allow depositors to draw against checks deposited before they were actually collected, but this depositor had never done so except in a few special instances, when a special agreement was made by which the bank agreed to advance certain specified sums of money on the depositor's checks in excess of his deposits. It was held that under these facts the title to the checks would have passed to the bank, and the relation of the depositor to it would have been that of creditor, but as the bank was, at the time the deposit was made, insolvent, and its doors were closed fifteen minutes afterward, the title to the checks did not pass from the depositor to the bank: *City of Somerville v. Beal, Receiver*, Circuit Court of the United States, District of Massachusetts, March 14, 1892, COLT, J. (49 Fed. Rep., 791).—*H. L. C.*

CONFLICT OF LAWS—FORMALITIES IN EXECUTION OF CONTRACT—LIMITED PARTNERSHIP.—A contract made in Louisville, between the agent of a limited partnership, organized under the laws of Pennsylvania, and a Kentucky corporation, was not executed with the formalities required by the laws of Pennsylvania in contracts of such partnerships. Held: That the question of the validity was to be determined by the laws of Kentucky, where the contract was made, and not by the laws of Pennsylvania: *Park Bros. & Co. v. Kelly Axe Manufacturing Company*, Circuit Court of Appeals of the United States, Sixth Circuit, January 16, 1892, JACKSON, J. (49 Fed. Rep., 618).—*H. L. C.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—The act of the legislature of a State, regulating the planting and taking of oysters in the waters of the State, and making it unlawful for any person, not a resident of the State, to take or transport oysters from, in or through any of the waters of the State, or for any person, whether a citizen of the State or of any other State or country, to ship beyond the limits of the State any oysters taken from the waters of the State while the same are in shells, is not a violation of the provisions of Const. U. S., Art. 1, § 8, as a regulation of interstate commerce: *State v. Harrub*, Supreme Court of Alabama, April 5, 1892, per COLEMAN, J. (10 So. Rep., 752).—*H. N. S.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—TAXATION OF MERCHANDISE BROKERS.—Cap. 96, Sec. 9, of the Tennessee laws of 1881, provides that every person or firm dealing in any article whatever, whether as factor, broker, buyer or seller, on commission or otherwise, shall pay a privilege tax of \$50 a year, and in addition ten cents on every hundred dollars of capital invested; but if no capital be invested, then $2\frac{1}{2}$ per cent. of their gross yearly commissions, charges or compensation, for which they shall give bond at the time of taking out the \$50 license. The complainants rented a room within the taxing district of Shelby County, where they exhibited samples and carried on correspondence with their respective principals, but handled no goods, doing the same business as commercial drummers, the only difference being they were stationary. They took out a license to do a general merchandise brokerage business, paying the \$50 and giving bond to return their gross commissions. All the sales negotiated, however, were exclusively for non-resident firms, and all the merchandise so sold was in other States than Tennessee, where the sales were made, and was shipped into Tennessee. Complainants filed a bill to restrain the collection of the $2\frac{1}{2}$ per cent. tax on their gross commissions, a demurrer to which bill was sustained by the Supreme Court of Tennessee. Held: That under the circumstances the complainants were liable for the tax. What position they would have occupied if they had not undertaken to do a general merchandise business, and had taken out no license therefor, but had simply transacted business for non-resident principals, not decided: *Ficklen v. Taxing District of Shelby County*, Supreme Court of the United States, FULLER, C. J., HARLAN, J., dissenting, April 11, 1892.—*F. C. H.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE REGULATION—INVALIDATION OF CONTRACT.—A company had been formed in Indiana for the purpose of piping natural gas from wells in Indiana to Chicago and other points in Illinois, and had made a contract with a construction company for the erection of the necessary works, consisting of the pipe-line and pumping machinery sufficient to create a pressure of 420 lbs. to the square inch, the pressure necessary to make the gas flow through the entire length of pipe. Before the completion of the works the State of Indiana passed an act making it unlawful to transport natural gas at a greater pressure than 300 lbs. to the square inch. A stockholder of the parent company thereupon filed a bill against both companies to restrain the further execution of the contract between them on account of its illegality, and to restrain the parent company from continuing the transportation of the gas at a pressure exceeding 300 lbs. to the square inch, whereby it was incurring heavy penalties. The decree of the Court below, sustaining a demurrer to the bill, was reversed: *Jamieson v. Indiana Natural Gas Co.*, Supreme Court of Indiana, June 22, 1891, ELLIOTT, C. J., OLDS, J., dissenting (3 Interstate Com. Rep., 613).

The same Court decided in *State v. G. & O. O. G. & M. Co.*, 2 Int. Com., 758, that a State statute which prohibited piping or otherwise conveying natural gas or petroleum out of the State was void.—*F. C. H.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—SALE OF OLEOMARGARINE—ORIGINAL PACKAGE.—A State act prohibiting the manufacture and sale of oleomargarine, and declaring that the manufacture, selling, or having in possession with intent to sell, any substance the manufacture of which is hereby prohibited, shall be subject to the penalty of \$100, applies to a sale, within the State, of oleomargarine manufactured outside of the State; and such an act is a valid exercise of the police power of the State for the protection of the public health, and is not unconstitutional as an interference with interstate commerce, in so far as it prohibits the sale of oleomargarine in the State from a broken original package brought from another State. Nor is a sale of two pounds from a ten-pound package brought from another State protected as a sale in the original package, as the contents of the ten-pound package, which is broken after having been brought into the State, became, by such breaking, a part of the common mass of property within the State and subject to its laws: *Commonwealth, to use of Philadelphia County et al., v. Paul et al.*, Supreme Court of Pennsylvania, April 18, 1892, *per curiam* (24 Atl. Rep., 78).—*H. N. S.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE STATUTE REQUIRING PROMPT SHIPMENTS.—Civil action brought to recover a penalty imposed by Section 1967 of the Code of North Carolina, for neglecting to forward freight for more than five days after delivery for shipment without consent of shipper. The goods had been consigned by a shipper in Wilmington, N. C., to a consignee at a station on defendant's line in South Carolina. The Court below granted a non-suit, holding the act unconstitutional as to interstate shipments. Reversed. Such a statute does not regulate interstate commerce in the constitutional sense and tends to promote rather than burden it: *Bagg v. W. C. & A. R. R. Co.*, Supreme Court of North Carolina, AVERY, J. (3 Inter. Com. Rep., 803).—*F. C. H.*

CORPORATIONS—ACTS OF A MAJORITY OF THE STOCKHOLDERS—WHEN REGARDED AS THE ACTS OF THE CORPORATION—ULTRA VIRES—PUBLIC POLICY—"TRUST" COMBINATIONS.—The Standard Oil Co. of Ohio was a corporation whose stock was divided into 35,000 shares. The owners of 34,993 of these shares transferred their stock to certain trustees, in consideration of an agreement made between themselves and the stockholders of other corporations and the members of limited partnerships engaged in the same business as was the Standard Oil Co. In return for the stock the stockholders were to receive from the trustees trust certificates of the same par value as was the stock. The trustees were empowered, under the agreement, as the apparent owners of the stock, to elect directors of the several companies and thereby control their affairs in the interest of the trust, and to receive all dividends made by the several corporations and limited partnerships, from which dividends were to be paid by them to the holders of the trust certificates. The remaining seven shares of stock continued to be held by certain stockholders of the Standard Oil Co. Held: (1) That the fiction that a corporation has a separate entity apart from the existence of the natural

persons composing it, is not to be regarded when an act done by a majority of the stockholders' is not within the reason and policy of the corporation; (2) That the agreement in the present case resulted in the creation of a monopoly, that monopolies are opposed to the public policy of the State of Ohio, and that, therefore, in the present case the action of the stockholders was to be regarded as the act of corporation, and *ultra vires* of the corporation, and could be challenged as such by the State in a proceeding in *quo warranto*: *State v. Standard Oil Co.*, Supreme Court of Ohio, MINSHALL, J., March 2, 1892 (30 Northeast. Rep., 279).—*W. W. S.*

CORPORATIONS—ELIGIBILITY OF DIRECTORS—ELECTIONS.—The general corporation laws of Kansas provide that in all elections for directors of a corporation created by or existing under the laws of Kansas, at least three of those chosen must be citizens and residents of Kansas. At an election held by the stockholders of such a corporation, eleven non-resident directors were elected, though three resident stockholders were voted for. The presiding officer of the meeting then declared that, agreeably to the laws of Kansas, the three citizens of Kansas voted for were elected, and that of the other gentlemen voted for, eight of the non-residents voted for were elected. The directors so declared elected duly qualified and entered upon the discharge of their official duties. The three non-resident stockholders, who received a large majority of the votes cast, but had not been declared elected, brought a proceeding in *quo warranto* to obtain possession of the offices held by the three resident directors. It was held they could not maintain the action and were not entitled to the relief they sought: *Horton v. Wilder*, Supreme Court of Kansas, March 5, 1892, JOHNSTON, J. (29 Pacific Reporter, 566).—*J. A. McC.*

CORPORATION—INSOLVENCY—UNPAID SUBSCRIPTION TO STOCK—SET-OFF.—Upon the bankruptcy of a corporation, a stockholder owes to the corporation only such portion of his unpaid subscription as may be necessary, with the other assets of the corporation, to satisfy the claims of its creditors; and the payment of such portion can be enforced only when the amount necessary for the stockholder to pay has been approximately ascertained. Where a stockholder is also a judgment creditor of the corporation, he cannot be compelled to set-off the amount of his unpaid subscription against the amount of his judgment: *Gilchrist v. Helena, Hotspring and S. W. R. Co.*, Circuit Court of the United States, District of Montana, February 25, 1892, KNOWLES, J. (49 Fed. Rep., 519).—*H. L. C.*

CORPORATIONS—RECEIVERS—CONFLICTING APPOINTMENTS BY STATE AND FEDERAL COURTS.—In cases of conflicting appointments of receivers of a railway company by State and Federal Courts, the question is to be determined, not by which action was first commenced, but by which Court first acquired jurisdiction over the property. Service of process gives jurisdiction of the person, seizure gives jurisdiction, of the property, and until it is seized the Court does not have jurisdiction.

East Tennessee V. & G. R. Co. v. Atlanta and F. R. Co., Circuit Court the United States, Southern District of Georgia, February 24, 1892, SPEER, J. (49 Fed. Rep., 608).—*H. L. C.*

CORPORATIONS—TRANSFER OF STOCK—NEGLIGENCE.—An executrix held capital stock of a corporation in trust for the children of the testator, with power to sell the same at her discretion. The corporation was the custodian of the stock thus held, and had knowledge of the trust and of the power to sell. The request of the lawfully constituted attorney of the trustee, that part of the said stock should be transferred to a national bank and part to F., "cashier," was granted by the corporation. The transfers were, in fact, by way of pledge to secure the attorney's individual indebtedness, and were made without authority and in fraud of the rights of the *cestui que trust*. The corporation had no knowledge of the attorney's wrongful act. Held: That the corporation was not guilty of any negligence in permitting the transfer, as it had a right to presume that the act of the trustee's attorney was in pursuance of the trustee's right to sell. The fact that the transfers were made to a national bank, which has no power to purchase such stock, or to the cashier of such a bank in his official capacity, cannot be held to put the corporation upon notice of the fraud upon the rights of the *cestui que trust* by the executrix, who had no power under the will to make such pledge, as her duties in administering the estate had ended, and the stock was held by her as trustee: *Peckham et al. v. Providence Gas Co. et al.*, Supreme Court of Rhode Island, January 23, 1892, per TILLINGHAST, J. (23 Atl. Rep., 967).—*H. N. S.*

ELEVATED RAILROADS—DAMAGES FOR INJURIES TO PROPERTY COMMITTED BY—MEASURE OF INCONVENIENCE CAUSED BY NOISE.—Plaintiff, the owner of property abutting on a street along which an elevated road was built, brought an action for damages against the road for injuries done his property, none of which was taken by the defendant. Held: That in estimating the permanent or fee damage, the plaintiff was entitled to recover for the injury to his easements of light, air and access only, and that the noise of the operation of the road should not be taken into account: *American Bank Note Co. v. N. Y. El. R. Co.*, Court of Appeals of N. Y., FINCH, J., RUGER, C. J., and PECKHAM and O'BRIEN, J. J., dissenting, December 15, 1891 (29 Northeast. Rep., 302).—*W. W. S.*

ELEVATED RAILROADS—DAMAGES FOR INJURIES TO PROPERTY COMMITTED BY—MEASURE OF INTERFERENCE WITH PRIVACY—NOISE—INTERCEPTION OF VIEW.—Plaintiff, the owner of property abutting on a street along which an elevated railroad had been built, brought an action against the railroad company for injuries done his property, none of which was taken by the defendant. The structure of the road was illegal. Held: That in estimating the rental value it was proper to take into account the annoyance which plaintiff suffered from interference with his privacy in the occupation of his premises, from the noise of operating the road, and the interception by the road-structure of the view of the premises by persons passing along the other side of the street: *Messenger v. Manhattan Ry. Co.*, Court of Appeals of New York, EARL, J., January 20, 1892 (29 Northeast. Rep., 955).—*W. W. S.*

EMBEZZLEMENT BY SERVANT—WHAT CONSTITUTES—LARCENY.—

A man employed to sell liquor in a store placed some money in the drawer of a cash register intending to appropriate it. He placed it in the drawer simply for his own convenience in keeping it. He did not register the sale, and directly took the money out again. Held: That he was guilty of embezzlement and not of larceny. *Commonwealth v. Ryan*, Supreme Judicial Court of Massachusetts, HOLMES, J., February 24, 1892 (30 Northeast. Rep., 364).—*W. W. S.*

HABEAS CORPUS—INTERSTATE EXTRADITION—FEDERAL COURTS.—

The issuance of a warrant of rendition by the Executive of a State is *prima facie* evidence only that the person whose surrender is demanded is a fugitive from justice, and the action of the Executive may be reviewed by the Federal courts upon habeas corpus at any time before the removal of the prisoner. The issuance of the warrant of rendition is, however, sufficient to justify removal until the presumption is overthrown by contrary proof. But where the act of rendition has been consummated by the delivery of the prisoner to the demanding State, the Federal process has spent its force; the custody of the prisoner is controlled by the writs of the demanding State, and no Federal question is involved: *In re Cook*, Circuit Court of the United States, Eastern District of Wisconsin, April 4, 1892, JENKINS, J. (49 Fed. Rep., 833).—*H. L. C.*

HOMICIDE—EXPERT TESTIMONY.—On the trial of a defendant for murder it was error to allow a witness, who claimed to be a physician and who had two years' experience in attending to gunshot wounds, to testify that the muzzle of the defendant's pistol was about four feet from the body of the wounded man, so far as the witness could tell from the nature of the wound. A physician is not an expert as to matters of common knowledge or observation. It is of universal knowledge that where the flesh is burned from a pistol wound, that the pistol must have been close to the body: *People v. Lemperle*, Supreme Court of California, March 26, 1892, TEMPLE, C. (29 Pacific Reporter, 709).—*J. A. McC.*

INSURANCE—FORFEITURE OF POLICY.—Though a policy expressly stipulates on its face that it will be forfeited unless payments are made on specified days, nevertheless, if the company, by accepting payments after a specified day has passed, leads the insured to expect that this condition in the policy will not be enforced, it is a waiver of the condition on the part of the company, and the company cannot take advantage of a delay in payment to forfeit the policy: *Hartford Life Ann. Ins. Co. v. Unsell*, April 4, 1892, Mr. Justice HARLAN (143 U. S., 439).—*W. D. L.*

MARITIME LIENS—WAGES—COLLISION—PRIORITY.—A maritime lien, arising out of damage done in a collision caused by negligent navigation, is entitled to priority over the lien of wages of the crew of the offending vessel, accruing prior to the happening of the collision; but wages accruing after that time are entitled to priority, as the service of the crew preserves the *res* for subjection to the lien of the damage claimant. *The F. H. Stanwood*, Circuit Court of Appeals of the United States, Seventh Circuit, March 8, 1892, JENKINS, J. (49 Fed. Rep., 577).—*H. L. C.*

MARRIED WOMEN—SEPARATE ESTATE—CONSTRUCTION OF TRUST DEED.—A conveyance of property, executed by a husband and wife to a trustee to pay over the rents and profits to the wife for her sole and separate use during her life, contained a provision that if the wife survived the husband, the trustee should, if requested by her after the husband's decease, "and being discovert," transfer the trust property to the wife for her own benefit. The husband died, and the wife requested the trustee to reconvey the trust property to her, which he refused to do, as he alleged he had no direct knowledge of the husband's death. A bill was filed to compel him to convey, and pending the suit the complainant remarried. Held: That the wife was unquestionably entitled to a reconveyance of the trust property discharged of the trust, upon her husband's death; nor was her right defeated by her second marriage. Whether a separate use trust shall continue through several marriages is wholly a matter of intention, to be discovered from the instrument creating the trust. At the time of execution of the instrument in this case, the contingency of a second marriage by the wife was not contemplated; its whole purpose was to protect the wife's estate from the mismanagement of her then husband: *Winchester et al. v. Machen et al.*, Court of Appeals of Maryland, March 16, 1892, per McSHERRY, J. (23 Atl. Rep., 956.)—*H. N. S.*

MASTER AND SERVANT—EVIDENCE.—In an action against a railroad company for the negligent killing of an employee, it is competent for the defendant to offer in evidence that it was the custom to run its switch engines at a rate faster than that allowed by a city statute, and that deceased knew it, as bearing on the extent of the risk which decedent voluntarily assumed by remaining in its employ, with knowledge of the fact that switch engines were run at an illegal rate of speed: *Abbot v. McCadden*, Supreme Court of Wisconsin, March 22, 1892, WINSLOW, J. (51 Northwest. Reporter, 1081).—*J. A. McC.*

MECHANICS' LIENS—RIGHTS OF SUB-CONTRACTORS.—A contractor agreed in his contract that the building should be built and delivered free of all liens and incumbrances. On a *sci. fa. sur* mechanics' lien, filed by a sub-contractor against the property, held, that he could have no such lien, as he presumed to have notice of the terms of the original contract and is bound thereby: *Bolton v. Hey et al.*, Supreme Court of Pennsylvania, March 28, 1892, *per curiam* (23 Atl. Rep., 973).—*H. N. S.*

MORTGAGEE IN POSSESSION—FOR WHAT ACCOUNTABLE.—While a mortgagee who enters into possession of the mortgaged premises is accountable to the mortgagor for the profits derived therefrom, he cannot be held liable for profits which a shrewder business man might have made. Therefore, when the defendant entered into possession of a hotel on which he held a mortgage, and leased it to a third person, he cannot be held liable, because he might have leased it for saloon purposes and thereby derived a larger income, it having been shown that he acted in good faith: *Sheldon v. Curtis*, Supreme Court of Michigan, April 22, 1882, GRANT, J. (51 Northwest. Reporter, 1057).—*J. A. McC.*

NEGLIGENCE—INJURY TO EMPLOYEE—FELLOW-SERVANT.—Plaintiff was employed by a stevedore hired to unload defendant's vessel, defendant furnishing steam-power and a man to run the winch. The latter failed to obey an order of the plaintiff while hoisting out the cargo, in consequence of which plaintiff was injured. Held: That the defendant was liable, as the winchman, though receiving from the plaintiff orders when to hoist and when to lower, was not a fellow-servant: *Johnson v. Netherlands American Steam Nav. Co.*, Court of Appeals of New York, HAIGHT, J., FOLLETT, C. J., PARKER and LAUDON, J. J., dissenting, March 22, 1892 (30 Northeast Rep., 505).—*W. W. S.*

NEGLIGENCE—WHEN QUESTION OF FOR JURY.—The terms "ordinary care," "reasonable prudence," and similar terms, have a relative significance, depending upon the special circumstances and surroundings of the particular case. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court. The running of a railroad train within the limits of a city at a greater speed than is permitted by the city ordinances is a circumstance from which negligence may be inferred in case an injury is inflicted upon a person by the train. In an action against a railroad company to recover for injuries caused by the negligence of its servants, the determination of the fact of whether the person injured was guilty of contributory negligence is a question of fact for the jury. No conclusive presumption of law that the defendant railroad company is not guilty of negligence can be drawn from the circumstance that the railroad commission which had authority to require the railroad company to erect gates at grade-crossings had not required the company to erect gates at the crossing where the plaintiff's intestate was killed: *Grand Trunk Ry. Co. v. Ives*, Mr. Justice LAMAR, April 4, 1892 (144 U. S., 408).

PARTNERSHIP—WHAT CONSTITUTES.—Where three or more persons sign, acknowledge and file articles of incorporation under the general laws of Oregon, for the formation of corporations, and do nothing toward completing the organization, they cannot be held liable as partners, because one of their number, independently of the others, engages in the corporate business alone, under the corporate name, and who fails to comply with material conditions annexed by said law to the management of corporations. In order to be constituted partners such persons must engage actively in the business management of the concern, or allow their name to be used as partners or managers in the business. But it is a primary condition to their being partners at all, that the organization of the corporation be defective. *Rutherford v. Hill et al.*, Supreme Court of Oregon, April 5, 1892, STRAHAN, C. J. (29 Pacific Reporter, 546).—*J. A. McC.*

PROMISSORY NOTE—ORDER ON EXECUTORS—WHEN A PROMISSORY NOTE RATHER THAN A TESTAMENTARY PAPER.—A debtor executed and

delivered to plaintiff the following writing: "One year after my death I hereby direct my executors to pay J. (the plaintiff), his heirs, executors or assigns, the sum of \$1,976.90, being the balance due, etc." Held: That the writing was a promissory note and not a testamentary paper. *Hegeman v. Moon*, Court of Appeals of New York, *PECKHAM, J.*, March 15, 1892 (30 Northeast. Rep., 487).—*W. W. S.*

PROPERTY RIGHTS—IN SYSTEM OF ADVERTISING—IMPLIED CONTRACT FOR USE OF.—Plaintiff, to induce defendant to employ him, communicated to him a valuable system of advertising in confidence, without any agreement as to compensation therefor. Defendant refused to employ plaintiff, but used the system of advertising. Held: That the plaintiff was not entitled to recover for such use: *Bristol v. Equitable Life Assurance Society of United States*, Court of Appeals of New York, *LAUDON, J.*, March 22, 1892 (30 Northeast. Rep., 506).—*W. W. S.*

TRUSTS—LOSS OF INVESTMENT—APPORTIONMENT.—A fund was bequeathed by a testator to his executors in trust for the benefit of his widow for life, and the principal, at her death, to his residuary legatees. Among the investments of the trust fund was a mortgage on unimproved lands which the trustees were forced to buy in at a loss at a foreclosure sale. The widow died before the sale, and interest due her had accrued up to the time of her death. When the executor and trustee filed his account, a question arose as to the proportion in which the fund realized by the sale should be distributed between the representatives of the life tenant and the remainder-men. Held: That when a fund is held in trust for the benefit of one person for life, and another in remainder, and a part of that fund is lost because of the insecurity of a particular investment, such loss is to be apportioned between the life tenant and the remainder-man in the proportion which the principal sum involved in the insufficient security bears to the interest due upon it at the time when the security is realized upon, and the amount of the loss is determined: *In re Tuttle*, Prerogative Court of New Jersey, April 21, 1892, per *McGILL*, Ord. (24 Atl. Rep., 1).—*H. N. S.*

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THE DISTINCTION BETWEEN LEGISLATIVE
AND JUDICIAL POWER.

BY WILLIAM HAMILTON COWLES, ESQ.

The eager study of early institutions, which is a marked characteristic of the last two or three decades, has made it clear that at one time all the functions of government were exercised by what was primarily a council of war, composed of chief, head-men and people. Legislation consisted merely in agreeing on certain resolutions which the legislators themselves were forthwith to carry into effect. If a man was not strong enough to avenge his private injuries himself, his grievances were heard and redressed by the whole assembly; but fighting in Court was only slowly developed as a substitute for fighting in the field.¹ Such a form of government would obviously meet the needs of only a very primitive community. Everywhere some one of the three elements of the council gained power at the expense of the others, and the government tended accordingly toward monarchy, oligarchy, or democracy. In England

¹ See, for example, Spencer, *Political Institutions*, Ch. XIII; Maine, *Early History of Institutions*, Lect. IX and X.

the monarchic tendency prevailed. The king became not only the maker and enforcer of the laws, but the fountain of justice as well. He was himself the judge, and his "court" was wherever he was. But this concentration of power became in turn unsuited to the times; despotism became less necessary, and the increasing complexity of interests rendered it impossible for the most benevolent despot to do what was required. The former tendency was reversed, and from the days of King JOHN the struggle of head-men and people to recover their lost share in the government has met with increasing success. The head-men first, and afterward the people, have gained the upper hand, and have at last made England a democracy.

It seems now very obvious that the remedy at once for the despotism and for the overwhelming accumulation of business was a division of labor. And so it was gradually worked out. The nobles insisted first that they have a hand in passing tax laws, and that the king should not inflict punishment by his arbitrary fiat, but by the regular administration of law in the courts. These things being conceded, they were able to enforce their demands for an ever-increasing share in the legislative power. The people began to demand representation in this law-making body, and, once admitted, they have usurped the whole power. The veto was the last remnant of the king's legislative power, and it is gone. The House of Lords steadily lost power, and, at least since they rejected the Reform Bill and then "backed down" under the popular displeasure, their share in legislation has been a wholly subordinate one. The legislative power in England is in the House of Commons. The disallowance of the king's claim to act in person as judge was followed by a denial of his right to appoint the judges to hold at his pleasure merely. Then tenure during good behavior was supplemented by security of income, and the judiciary was independent except for the king's power of appointment and of pardon and the Commons' power of impeachment. Yet when MONTESQUIEU, from his study of the English government before the evolution had progressed quite so far, drew the conclusion that legislative,

executive and judicial powers ought not to be in the same hands,¹ it struck even Englishmen as a remarkable and important discovery in the science of government. He, if not in fact the first to distinctly apprehend this as the essential characteristic of the British Constitution, was emphatically the man who gave it vogue,² and in America his *Spirit of Laws* was a very gospel of politics in the last half of the eighteenth century.

This brief allusion to a very long process will serve at least to suggest where the maxim concerning the division of the powers of government came from, and so prepare the way for finding out what it means. In the first place, it appears that it has resulted from a slow analysis and differentiation of a congeries of powers once wholly unclassified and not even recognized as having distinctive characteristics. There is no ground for assuming that the differentiation is complete, or for expecting to find the distinctions so clearly drawn that every function of government can be assigned to its place in the scheme as unhesitatingly as a botanist would classify a plant. In the second place, it is clear that no one has ever proposed to apply the maxim so rigidly as to secure the absolute separation of the three departments of government.³ A system of "checks and balances" depends precisely on *not* placing all legislative, or all executive, or all judicial power in one department, and this must be regarded as a practically contemporaneous modification of the maxim which further detracts from its definiteness.

When the Declaration of Independence gave the colonies a free rein in determining how they would be governed, most of them promptly framed written constitutions with this maxim as the very foundation, and the Convention of 1789 followed them in this respect.⁴ The great merit of these constitution-makers as constructive statesmen consists in the fact that they devised a means of making checks and balances practically effective by making the

¹ *Spirit of Laws*, Bk. XI, Ch. VI. First published in 1748.

² MADISON, *Federalist*, No. 47.

³ MADISON, *Federalist*, No. 47.

⁴ HAMILTON, *Federalist*, No. 81.

judiciary department strictly co-ordinate with the others and independent of them. Nearly all the State constitutions have provided in varying terms that the powers of government shall be vested in three separate and distinct departments.¹ Massachusetts words the provision as follows:

"In the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the executive or legislative powers, or either of them; to the end that it may be a government of laws and not of men."²

This is retained from the Declaration of Rights of 1780, and in its time must have been very striking language. Another somewhat typical form of the statement is that found in the Constitution of Indiana:³

"The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." The Constitutions of the United States and of the States of New York, Pennsylvania, Delaware, Ohio, Wisconsin, Kansas and North Dakota have no formal provision of this sort, but, like all the rest, their principal articles begin with, "The legislative power shall be vested," "The executive power shall be vested," "The judicial power shall be vested;" and it is clear, both on reason and authority, that this enjoins the separation of the departments just as imperatively as the express mandate. It may be taken as settled in American constitutional law that all legislative power is vested in the legislature, and all judicial power in the courts, except as otherwise expressly provided in the several constitutions.⁴

¹ For citations, see 1 Stimson, American Statute Law, 39.

² Declaration of Rights, Art. XXX. ³ Art. III, Sec. 1.

⁴ Letters of JAY, C. J., and others, to President WASHINGTON, printed in 2 Dall., 410 n.; *Marbury v. Madison*, 1 Cranch, p. 67; *Kilbourn v. Thompson*, 103 U. S., 168; *Cooley*, Constitutional Limitations, No. 88, No. 174.

Difficulties arise not so much in construing the constitutional exceptions to the principle as in determining what acts are legislative and what are judicial. Formal definitions are numerous enough, but not very satisfying where the question is doubtful.

"A marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the Constitution, those decisions should be founded. It is the province of judges to determine what the law is upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of the parties with the law of the land before established, is, in its nature, a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act."¹

"The difference between the departments undoubtedly is that the legislative makes, the executive executes, and the judiciary construes the law."²

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."³

"The legislative power we understand to be the authority under the Constitution to make laws and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes which the legislative will has prescribed. On the other hand, to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department."⁴

¹ *Merrill v. Sherburne*, 1 N. H., 204.

² *MARSHALL*, C. J., in *Wayman v. Southard*, 10 Wheat., p. 46.

³ *FIELD*, J., dissenting, in *Sinking Fund Cases*, 99 U. S., p. 761.

⁴ *COOLEY*, *Constitutional Limitations*, No. 90. For other definitions of like tenor, see *Ratcliffe v. Anderson*, 31 Gratt., p. 107; *Smith v. Strother*, 68 Cal., p. 196; *Denny v. Mattoon*, 2 All., p. 361; *Shepard v. Wheeling*, 30 W. Va., p. 482.

It is said, in an early Vermont case, that "no power can be properly a legislative and properly a judicial power at the same time; and as to mixed powers, the separation of the departments in the manner prescribed by the Constitution precludes the possibility of their existence."¹ This may be true theoretically, but it seems to imply something more *a priori* and artificial than what we know our constitutions to be, and it will be found difficult to apply. The conclusion of a California court that there is a multitude of minor duties of a nondescript character which are not strictly legislative, or strictly executive, or strictly judicial,² is equally true. And dubbing these "administrative" does not much mend the matter, for it is at once obvious that this does not make a fourth department, but merely gives a name to a group of duties taken from the legislative and executive departments. Since the legislative department is the broadest in scope, and perhaps corresponds most nearly to the original depository of all the powers, it seems logical to leave to it the residuum, and say that everything not clearly executive or clearly judicial is legislative. And, in general, it is to be borne in mind that the question always is, not what is the etymological meaning of legislative and judicial, but what were in fact the functions of legislature and courts, respectively, at the time the Constitution in question was framed.³

It will be more profitable to ascertain what is the practical interpretation given to the terms in cases where the courts have been obliged to determine whether the principle of the division of powers has been violated. There was at first a tendency to run to the legislature for a special dispensation in the way of an appeal or a new trial, or a suspension of a troublesome statute, when existing laws seemed to have left a "hard case" stranded, and it took some time to make it thoroughly understood that any such dispensation was wholly inconsistent with the co-ordinate position of the judiciary. Soon after the organization of the Federal

¹ *Bates v. Kimball*, 2 Chip., 77. ² *People v. Provines*, 34 Cal., 520.

³ *Shepard v. Wheeling*, 30 W. Va., p. 482; *Copp v. Henniker*, 55 N. H.,

Supreme Court, a case came to it from Connecticut in which a statute granting an appeal out of time was attacked as unconstitutional.¹ It was held that the act was not *ex post facto* or otherwise repugnant to the Constitution of the United States, and it was pointed out that while it was an exercise of judicial, not of legislative authority, Connecticut was still acting under her old charter, and judicial power was not forbidden to the legislature. The same question was raised early in Maine² and Vermont³, and it was decided that granting an appeal in a special case is an encroachment on the power of the judiciary, and is forbidden to the legislature. The other departments of the government have no control over judgments of the courts,⁴ save such as may be given them by the constitutional provisions concerning pardons.

And interference with the course of pending cases, before judgment, is equally forbidden. As has been said in a Massachusetts case:⁵ "If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in the place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of the courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature has no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before the courts, or to impair or set aside their judgments, or take cases out of the settled course of judicial proceeding."

Curative statutes, so-called, frequently give rise to very

¹ *Calder v. Bull*, 3 Dall., p. 398.

² *Lewis v. Webb*, 3 Greenl., 298. ³ *Bates v. Kimball*, 2 Chip., 77.

⁴ Story, Constitution, Sec. 1587; *Ratcliffe v. Anderson*, 31 Gratt., 105.

⁵ *Denny v. Mittooa*, 2 All., 351.

nice questions which it would carry us too far to consider here, but all the cases agree in this, that jurisdictional defects in *judicial* proceedings cannot be cured by subsequent legislation so as to render valid a judgment which would otherwise be void ; for in such case the validity must come from the statute itself, and the legislature cannot render judgments.¹ Expository statutes are effective from date, being practically new enactments, but they cannot reverse decisions already made;² nor can they control the interpretation of the courts in dealing with causes of action already accrued.³ Pennsylvania courts were at first rather complainant toward legislative encroachments of this sort ; but in *Greenough v. Greenough*,⁴ Chief-Justice GIBSON, after adverting to the fact that their former supineness in this regard had tended to destroy the balance between the departments in that State, emphatically declined to allow any retrospective force to a legislative interpretation of their Wills Act, purporting to apply to the wills of persons already deceased.

A particularly good illustration of the difference between legislative and judicial power is afforded by the somewhat common attempt to enlist the aid of the courts in organizing municipal corporations and changing their boundaries, the purpose obviously being to secure an impartial arbiter between the corporation and the property-owners concerned. Section 431 of the Iowa Code, for example, provides in substance that when a city desires to annex contiguous, platted territory, it may file a petition describing the land, naming the owners and attaching a plat ; that the city shall be deemed the plaintiff and these owners defendants, and the further proceedings shall be as in other cases, as near as may be. If the Court finds that the territory is subdivided and contiguous, and that justice and equity require the admission of all or any of it,

¹ *Maxwell v. Goetschius*, 40 N. J. L., 383 ; *Houseman v. Kent*, 58 Mich., 364.

² *COOLEY*, Constitutional Limitations, No. 94.

³ *Ogden v. Blackledge*, 2 Cranch, 194 ; *Holden v. James*, 11 Mass., 396.

⁴ 11 Pa. St., 489.

a decree shall be granted accordingly, and it is annexed. In the case of the City of Burlington *v.* Leebrick,¹ the constitutionality of the act was drawn in question, but the Court held that there were definite issues presented and that the determination of them was so far judicial in character that it might be referred to the courts. Nebraska has a similar statute, following a little more closely the usual forms of litigation by providing for personal service on defendants by the sheriff, instead of notice by publication as in Iowa, and the decision in City of Burlington *v.* Leebrick has been followed.²

Kansas has a statute³ providing, less formally, that a city of the second class, desiring to annex unplatted, adjacent territory, may present a "petition" to the judge of the district court, describing the territory "and asking said judge to make a finding as to the advisability of adding said territory to said city." "Upon said petition being presented to said judge, with proof that notice of the time and place said petition shall be so presented has been published for three consecutive weeks in some newspaper published in said city, he shall proceed to hear testimony as to the advisability of making such addition; and upon such hearing, if he shall be satisfied that the adding of such territory will be to its interest, and will cause no manifest injury to the persons owning real estate in the territory sought to be so added, he shall so find; and thereupon the city council of said city may add such territory to said city by an ordinance providing for the same." This was attacked as conferring legislative power on the judiciary, but the court balanced off the authorities on the point and said, as it had been held both ways, the action could not be so clearly unjudicial as to warrant them in overthrowing the statute.⁴

Kansas also has a statute,⁵ providing that when a city

¹ 43 Ia., 252 (1876).

² City of Wahoo *v.* Dickinson, 23 Neb., 426 (1888).

³ Compiled Laws, 1889, Sec. 884.

⁴ Callen *v.* City of Junction City, 42 Kan., 627 (1890).

⁵ Compiled Laws, 1889, Section 552.

of the first class desires to enlarge its limits it shall describe the proposed new boundary by ordinance, and, within twenty days, publish it in the official city paper; and the mayor, at the next term of the district court, shall present to said court a copy of the ordinance with proof of publication. "Thereupon said court shall determine whether said publication has been made as herein required, and shall then consider said ordinance, and by its judgment either approve, disapprove or modify the same, first hearing all objections, if any, and proofs, if any, offered by said city or persons affected by said ordinance. Should said ordinance be approved or modified by said court, then the limits or area of said city shall be enlarged or extended, as therein designated, from the date of such approval or modification. But, should it be disapproved entirely, then the limits or area of the city shall remain unaffected by such proceedings; but should the same be approved entirely, or modified and approved, the judgment of said court shall stand, and the limits of such city shall be extended, as is in said judgment specified, and the determination of the matter thus submitted to said court shall be final; and all the courts of the State shall take judicial notice of the limits or area of such city, as thus enlarged and extended, and of all the steps in the proceedings leading thereto." This was also challenged as unconstitutional on the same ground, but it was held that the power therein conferred on the district court is "judicial," within the decision in the preceding case, and that the statute is valid.¹ The point was again raised, and again decided the same way and on the same ground, the last decision not even being referred to.² Nor in any of these cases was any notice taken of an early Kansas decision, in which the Court went a little out of its way to hold that similar authority, then conferred on the probate court, was judicial.³ The precise question as to whether such functions, if delegated by the Legislature, could be delegated to

¹ *Huling v. City of Topeka*, 44 Kansas, 577 (1890).

² *Hurla v. City of Kansas City*, 27 Pac. Rep. (1891).

³ *Kirkpatrick v. State*, 5 Kansas, 673 (1868).

courts, was not very distinctly raised and no authority was cited on the point. The first Kansas case did cite, in addition to the Iowa and Nebraska decisions, as supporting the conclusion there reached, *Blanchard v. Bissell*,¹ *Kayser v. Trustees of Bremen*,² and *Borough of Little Meadows*.³ Of these the first is not in point at all, because there the council petitions the county commissioners, whose functions are primarily political. The others are briefly and unsatisfactorily reported, but it appears from the Missouri case that a petition was presented to the Court, and if it found certain facts to be as therein set forth, the town was to be declared incorporated, regardless of the Court's personal opinion as to the expediency of it. This proceeding is said to be judicial. From the Pennsylvania case it appears that it was the practice to refer the petition for incorporation to the Grand Jury, who reported to the Court of Sessions as to the truth of the facts alleged therein, and the Court confirmed the report if favorable. In that particular case it was held simply that the corporation laws did not authorize the Court to include several farms with a straggling hamlet and call it a village, and the question as to whether courts could rightfully exercise such functions in any case was not at all considered. Moreover, the "Court of Sessions" in that State seems to designate "the tribunal transacting county business," and to be, like the Board of County Commissioners of other States, rather an administrative than a judicial body.

These three cases, therefore, seem not to afford a very secure foundation for a decision that needs authority to rest on, and it seems safe to assume that the Iowa, Nebraska and Kansas decisions will be generally regarded as out of harmony with the principles heretofore laid down as settled. The real nature of the proceedings is, perhaps, more apparent in the Kansas cases, because they masquerade less in the guise of an ordinary lawsuit. What really determines the action of the Court in all the cases is the judge's personal opinion as to the *expediency* of including certain territory, for the future, in a particular political subdivision.

¹ 11 O. St., 96.

² 16 Mo., 88.

³ 35 Pa. St., 335.

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The findings as to platting, and contiguity, and notice, are a mere preliminary. If the conditions under which annexation is allowable are not present, the Court cannot act at all; but if the necessary conditions are shown to exist, they do not at all control the action of the Court. This phase of the matter receives comparatively little notice in the opinions, while the preliminary findings are emphasized as if the courts were sure that so much, at least, is judicial. It is said in the Iowa case "that it is not the sole province of courts to determine what the existing law is in relation to some existing thing already done or happened. It is as much a judicial act to determine what are the facts of a particular case, and whether they bring the case within the operation of a recognized principle of the existing law." True enough; but that is not the same thing as saying that it is a judicial act to determine what are the facts of a particular case, and whether they make it advisable to enact a new law. Determining facts is judicial only as it is a necessary incident to rendering judgment according to an existing law. There is nothing judicial about determining, as an abstract question, when Columbus discovered America, or in determining it for the purpose of enabling Congress to decide when the World's Fair, in commemoration of the event, ought to begin. One required to ascertain the facts of a particular case without the power to render a judgment therein reviewable only according to established law, is a commissioner, not a judge, however closely he may follow judicial forms.¹

And it is an abuse of terms to call the question whether justice and equity require the annexation of certain territory a judicial one because it calls for judgment and discretion. All legislative and most executive acts require the same.² Besides, it is only the political department of the government that has the privilege of considering the abstract justice and equity of its acts. "Justice and equity," for the courts, mean merely conformity to law, and one might easily fail to realize how radical a departure from

¹ *United States v. Ferreira*, 13 How., 40; 1 Kent, 297 n.

² *Auditor v. A. T. & S. F. R. R. Co.*, 6 Kan., 500.

Anglo-Saxon methods it is to leave the determination of them in any other sense to the judges. It is throwing away the fruits of a victory which it took a thousand years to win, and abandoning the attempt to secure a government of laws and not of men.

The determination of how the State shall be subdivided for the purposes of local government is pre-eminently legislative. The warrant for delegating it to political officers, like county commissioners and city councils, is in many constitutions slender enough. It is frequently implied, rather than expressly stated, local self-government being apparently so fundamental an assumption that it did not occur to anyone as being necessary to insert in the Constitution a formal declaration that it is to be retained.¹ But there is no ground for implying any kind of local management except such as was then customary, and certainly a legislature must find express warrant to justify it in requiring the *judiciary* to pass on the expediency of incorporating territory. Clearly a mere veto power is legislative in character, but the courts in the cases in hand have much more than this. The matter rather comes before them in the shape of a committee report, which they may adopt, reject, or amend to suit themselves.

In the Nebraska case, and in the first of the three recent Kansas decisions, the courts make much of the fact that the effect of the proceeding is to anticipate litigation and avoid a multiplicity of suits. It is said in the latter, for example : "To avoid separate suits of this character by individual landowners, and before property interests are affected and perplexing complications arise, this section provides for a determination of the rights of all the parties in one action.

"The practical effect of this statute is to submit to the district judge, in advance of its enactment, the question of the legality of the city ordinance."²

The novelty of this very desirable consummation might well have aroused some misgivings as to its regularity. To allow the judiciary a decision on the validity of a law before

¹ COOLEY, Constitutional Limitations, No. 191.

² Callen v. City of Junction, 43 Kan., p. 633.

it has involved a wrong to any would give the judiciary an absolute veto upon the legislature,¹ and the people no more want the judiciary than the legislature supreme. In fact the supremacy of the judiciary would be much the worse evil ; for the people might in a few months undo the results of legislative mistake or perversity, while the decrees of a judicial oligarchy might be remediless.² Moreover, neither the legislature nor individuals are at liberty to take up the time of the courts with mere legal conundrums, and judicial deliverances on matters not in litigation settle them, if at all, not by furnishing a proper precedent, but by committing the judge.³

The findings, then, as to justice and equity, as the terms are used in these statutes, could not be "judicial" under any circumstances, and the findings as to platting, contiguity and notice are not judicial in these cases, because they are not made with a view to determining "whether they bring the case within the operation of a recognized principle of the *existing* law."

If these conclusions are sound in theory, they are also abundantly supported by authority. A similar statute came before the Supreme Court of Illinois in the case of *City of Galesburg v. Hawkinson*,⁴ and that Court said : "Whether cities, towns or villages should be incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a question of policy to be determined by the legislative department." It was further pointed out that while courts may determine what are the corporate limits already established, whether they are as claimed, whether authority has been exceeded, etc., all this implies an existing law ; but here the question presented is, what *shall* the law be as to boundaries, and the decree is the answer. A legislature may not set aside a judgment, but no one would deny that it might the next moment change city boundaries as fixed by such a decree.

¹ MULFORD, *The Nation*, 205.

² WOODBURY, J., dissenting, in *Luther v. Borden*, 7 How., p. 52.

³ COOLEY, *Principles of Constitutional Law*, 139.

⁴ 75 Ill., 152 (1874).

Minnesota law of the same sort authorized the Court to incorporate so much of the described territory as might require, if it was satisfied that the interests of the inhabitants would be promoted. The Supreme Court say it is too clear for argument that the determination of such questions involves the exercise of purely legislative power.¹ The Supreme Court of California, speaking of the same matter with reference to a different statute, say: "Such a determination, when made, belongs to policy rather than law, and is legislative and not judicial. Any confusion which has been created in the authorities has arisen from the use of the word 'judicial' in more than one sense, and in applying it to all acts involving discretion and judgment, and confining it to the 'judicial power' which belongs to courts of justice, and relates to controversies on questions of public or private right."² It has been held in California that the propriety of including land in a municipality, in general, a political question for the legislature to determine;³ and in New York, that the action of supervising and incorporating towns is legislative.⁴ The California decision, to the effect that the governor, the legislature, and State engineer could not be made commissioners to divide the State into drainage districts and organize them as such, because this was a legislative function, and, if delegable at all, not delegable to executive officers, would seem to be entirely analogous in principle to the corporate limit cases.

The Legislature of West Virginia went beyond all the cases so far referred to by providing, generally, that on the application of ten resident taxpayers a Circuit Court might revoke, annul . . . any ordinance of a town or village, made contrary to law."⁶ This was clearly an obvious grant of legislative power to the courts.

¹ *Simons v. Minneapolis*, 32 Minn., 540 (1884).

² *Way v. Bennett*, 29 Mich., 451 (1874).

³ *City of Riverside v. City of Los Angeles*, 70 Cal., 461 (1886.)

⁴ *City of New York v. Carpenter*, 24 N. Y., 86 (1861).

⁵ *City of Los Angeles v. Parks*, 58 Cal., 624 (1881).

⁶ *City of Wheeling v. City of Wheeling*, 30 W. Va., 479 (1887).

the Courts. Annuling ordinances made contrary to law superficially bears more resemblance to judicial action than passing ordinances in the first instance, but they are alike legislative acts. To apply the doctrine of this case to the annexation of territory: if it would be legislative, on the petition of ten taxpayers having no special grievance to *annul* an annexation ordinance made contrary to law, *a fortiori* is it legislative, on petition of a city not claiming any infraction of its rights under existing laws, *to enact* what, if passed in the same terms by a legislative body, would be an annexation ordinance.

This case also calls attention to a common misapprehension as to the effect of a judicial decision as to the constitutionality of a law. Courts are frequently said to declare laws unconstitutional *and void*, and their language, it must be admitted, frequently takes that form. But, as is here pointed out, what they really do is to ignore a statute that is considered unconstitutional, and decide the case in hand as if the statute did not exist. The Act is not stricken from the statute book, and it is not superseded, revoked, or annulled. If the courts afterward change their minds, as did the Supreme Court of the United States in the legal tender cases, the statute is just as effective as if it had never been pronounced unconstitutional. As was said in an Ohio case: "The general and abstract question, whether an act of the legislature be unconstitutional, cannot with propriety be presented to a court; the question must be whether the act furnishes the rule to govern the particular case."¹ For this reason it is eminently appropriate that the legislature, if it acquiesces in the decision, should repeal such acts, as was in fact sometimes done² when for the courts to hold laws unconstitutional was a new thing.

It has been held in Tennessee that the *creation* of corporations is a legislative matter which could not be delegated to the courts even if the Constitution were silent in regard to it.³ As, however, their Constitution authorizes

¹ Foster v. Commissioners, 9 O. St., 543; Relation of the Judiciary to the Constitution, 19 American Law Review, 175.

² 19 American Law Review, p. 188.

³ State v. Armstrong, 3 Sneed, 634.

the legislature to grant to the inferior courts such powers with regard to private and local affairs as may be deemed expedient, they may be empowered to "*organize*" corporations; but they then act ministerially, not judicially, and no appeal lies from a refusal to organize.¹ These rulings are with immediate reference to business corporations, but the reasoning would seem to apply with even greater force to municipal corporations.

It would seem, therefore, that the considerations of reason and policy in favor of placing the regulation of municipal boundaries in the hands of the judiciary, ought to be more weighty than we have found, in order to justify a court in passing by these authorities to follow the Iowa, Nebraska and Kansas decisions. Moreover, the statutes there passed upon are not so nearly alike as they appear to have been considered. In Iowa there is no provision for the enactment of an ordinance by the council at any stage of the proceedings; under the Kansas statute last mentioned, an ordinance is the first thing, but from an examination of the statute as a whole, it is clear that the "judgment" of the court, not the ordinance, is ultimately to determine the status of the territory concerned. In Nebraska, on the other hand, and in Kansas under the second-class city act, the annexation is consummated by an ordinance to be passed after it has received judicial approval. It is not impossible that these ordinances might be held effective to annex the territory, even if the action of the Court in the matter were held to be unauthorized and wholly nugatory. No notice is taken of the distinction in any of the cases, and the opinions show that it was the intention to go the whole length in sustaining the action of the courts as judicial. An appeal is provided for in both instances. But in the Kansas statute it is from the judge of the District Court to the District Court, and as in that State the District Court consists of one judge, this seems to give a right rather less valuable than an "appeal from Philip drunk to Philip sober;" for in this instance Philip is presumably sober on both occasions, and there is no pro-

¹ *Ex parte Burns*, 1 Tenn., Ch. 83; *ex parte Chadwell*, *id.*, 95.

vision as to what would be the reward of a successful appeal if, in the meantime, the council had passed its ordinance. In fact an appeal is an absurdity where the question is as to the opinion of an individual as to the advisability of annexing territory. In the nature of things it can not be tried. This suggests the query whether leaving to the arbitrary will of a judge interests of citizens so important as the subjection of their property to the burdens of city government would be "due process of law" and the "equal protection of the laws" which everyone may claim, even if leaving the matter to a judge were otherwise objectionable.¹

The Iowa case was decided with only the inconclusive Pennsylvania decision previously referred to before it; the Nebraska judges ignored the Michigan case of *Shumway v. Bennett* because the statutes were different, and deliberately followed *City of Burlington v. Leebrick* in preference to *City of Galesburg v. Hawkinson*. Probably there was no oral argument in any of the Kansas cases, and none of them purport to go very fully into the matter as an original question.

There are numerous decisions of a miscellaneous character, which further illustrate the relation between legislatures and courts; but in considering these it is to be noted that in many constitutions there is express provision for certain mixed tribunals, in some of which the judicial, and in others the administrative element is the more prominent. Thus, some of the lower courts may be authorized to exercise some non-judicial functions; or the board of county commissioners, or supervisors, or whatever the corresponding officers may be called, may be vested with some judicial powers. It is only decisions that do not seem to turn on any peculiar provision of this sort that will be valuable on the general question.

A statute authorizing the parties to agree upon a member of the bar of the Supreme Court to try a case in which the judge is interested, is void. The attorney selected would not be a judge, and the legislature cannot vest judi-

¹ See *Yick Wo v. Hopkins*, 118 U.S., 356; *Shumway v. Bennett*, 29 Mich., 451.

cial power in any one else.¹ "It is as incompetent for the legislature to confer the power to tax upon the judiciary as upon the executive."² The legislature cannot require the Supreme Court to give its opinions in writing, because writing out the reasons for their decisions is not judicial,³ or require it to prepare the syllabi for the reports,⁴ or require courts to appoint surveyors.⁵ It seems that it may provide for commissioners to "assist" the Supreme Court, taking care not to authorize them to *decide* anything.⁶ On the other hand, legislative divorces seem to be bad on principle. Decisions the other way generally proceed on an established usage which it is scarcely practicable to overthrow.⁷

There is a dictum in a recent Pennsylvania case to the effect that admitting attorneys to practice is a judicial matter, and that the Legislature may not *order* admission on compliance with certain requirements.⁸ A recent New York law provides that the Supreme Court or county judge may, on the application of the local authorities, order a flagman or a gate to be maintained at railroad crossings, first giving notice to the company; and the Supreme Court has held, one judge dissenting, that this is a mere provision for determining the necessity, and not a delegation of legislative power.⁹ One is inclined to say that the former case is probably, and the latter certainly, wrong, unless they have some special constitutional warrant not referred to in the opinions.

It was said in a Kansas case that the action of the Board of County Commissioners, in rejecting a claim against the county, is so far judicial that an appeal may be taken,

¹ Van Slyke v. Insurance Co., 39 Wis., 390.

² Munday v. Rahway, 43 N. J. L., p. 348, quoting COOLEY, Taxation, 34.

³ Houston v. Williams, 13 Cal., 24. In a very emphatic opinion by Justice FIELD.

⁴ *Ex parte* Griffiths, Ind., 83.

⁵ Houseman v. Kent, 58 Mich., 364.

⁶ People v. Hayne, 83 Cal., 111; Railroad Co. v. Abilene Town Site Co., 42 Kan., 104. State v. Noble, 118 Ind., 350, is *contra*.

⁷ COOLEY, Constitutional Limitations, No. 113.

⁸ Petition of Splane, 123 Pa. St., 527.

⁹ People v. Railroad Co., 12 N. Y. Sup., 41.

but not so far judicial as to make the matter *res judicata* if the appeal is not taken.¹ It has since been held that the action is not judicial, but the appeal is still allowed.² Since the statute giving the "appeal"³ provides for notice to the county, possibly it may be said that appeal is not used in the technical sense, and this is merely a special "way of getting into court." It is clear that appeals, in the proper sense of the term, lie only from the action of a tribunal clothed with judicial authority, and acting in a judicial capacity.⁴ A statute also provides for an appeal from the commissioners' award of road damages, to be taken "upon the same terms, in the same manner, and with like effect as in appeals from judgments of justices of the peace in civil cases."⁵ The language here excludes any fiction about a special way of getting into court, and if the appellee was not already in court, there is no provision for service at all. The judiciary article of the Constitution authorizes the legislature to create courts inferior to the Supreme Court,⁶ and the legislative article provides that "the legislature may confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient."⁷ But both the language and the position of this clause seem to forbid reading into it authority to confer *judicial* power on the tribunal transacting the county business, and it would seem that an express permission of this sort is indispensable to justify making a political body also a court under the other section. Calling the action of county commissioners in such cases "quasi-judicial"⁸ is not meeting the point, and as an original question, it would seem that there is no authority for vesting judicial power in the commissioners in any case, and that therefore their decisions are not appealable.

¹ *Commissioners v. Keller*, 6 Kan., 307.

² *Gillett v. Commissioners*, 18 Kan., 410.

³ *Compiled Laws*, 1889, Sec. 1649.

⁴ *Story*, *Constitution*, 1761.

⁵ *Compiled Laws*, 1889, Sec. 5480.

⁶ Art. III, Sec. 1.

⁷ Art. II, Sec. 21.

⁸ *County of Leavenworth v. Brewer*, 9 Kan., p. 319; *Fulkerson v. Commissioners*, 31 Kan., 126.

There remains the question whether non-judicial functions, which may not be imposed on the courts as such, may yet be imposed on the judges as individuals. The question, of course, does not arise where, as is frequently the case, the Constitution provides expressly that persons exercising functions properly pertaining to one department shall not exercise those pertaining to any other. And it is difficult to discover any justification for such a subterfuge where this is not done. It does not at all avoid the reasons of policy which dictate the separation of the duty of making laws from that of expounding them. To litigate the constitutionality of a law before the legislature which passed it, or before a judge who had given it his approval before its enactment, would be unsatisfactory, not because of anything that pertains to the officers as such, but because of what pertains to them as men. Yet when, in 1793, the United States Circuit Courts were directed to examine into pension claims and report to the departments, while all agreed that the duties required were not judicial, and therefore could not be performed by them as courts, yet there was some difference of opinion at first as to whether the judges might not, outside their judicial duties, perform the services as commissioners. The first case under the Act went off on the ground that this was an unwarrantable construction of the statute,¹ but a little conference between the judges led them to the conclusion that the Constitution would not warrant it, if the statute did.

Long afterward the appointment of supervisors of congressional elections by the circuit judges, on a petition from voters, was opposed by certain citizens of Cincinnati as unconstitutional on this ground, but the duty was held to be judicial.² The judge added that if the Act directed him to act personally as supervisor, he would decline to obey it. It was also pointed out that the Constitution of the United States authorizes Congress to vest the appointment of subordinate officers in the courts of justice,³ and the statute was construed as giving the power to the Court.

¹ Hayburn's Case, 2 Dall., 409, 410 n.

² *In re* Citizens of Cincinnati, 2 Flip., 228.

³ Art. II, Sec. 2.

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The action seems not to be judicial except in the sense that it is thus authorized to be performed by a court; and under a similar State law it was held in Massachusetts that the court could not act because the appointment was not judicial, and the judges could not act because the Constitution expressly forbids them to hold such an office.¹ But these decisions do not go very far toward determining whether they might make such appointments under a Constitution which does not forbid them to perform other than judicial duties except by assigning the powers of government to a legislature, an executive and a judiciary.

It has been said in California that a police judge may be made *ex officio* police commissioner, because the three departments which the Constitution requires shall be kept separate are the departments of the State government, and the legislature may mix powers in the local government, which it is to establish, as much as it pleases.² This is certainly untying the knot by cutting it. The whole history of the doctrine, and the whole practical application of it elsewhere, forbids such an interpretation. There seems to be nothing peculiar in the Constitution of California to justify it, and it does not reassure one as to the correctness of the decision to find that it calls the appointment of policemen a judicial act, or if not strictly so, not so clearly executive or legislative as to be forbidden to the judiciary department.

It has been held allowable from early days in Kansas to impose other than judicial duties on the Probate Judge. In passing upon a portion of the liquor law of that State, which provides for the issue of "druggists' permits" by the Probate Judge, the correctness of these decisions was questioned, but it was thought then the less evil to follow them.³ It is said that the effect of the statute is to create the office of commissioner of licenses, and provide that it shall be filled by the person occupying the position of Probate Judge. It is also suggested that the earlier decisions

¹ Case of Supervisors, 114 Mass., 247.

² People v. Provines, 34 Cal., 520.

³ Intoxicating Liquor Cases, 25 Kan., 751.

are somewhat countenanced by the fact that the judges of the Supreme and District Courts, but not the judges of the Probate Courts, are expressly forbidden by the Constitution to hold other offices of trust or profit. If, however, this would be forbidden without an express prohibition, the omission of a prohibition cannot amount to a grant. In an earlier case there is an enumeration of the somewhat curious jumble of duties at that time given to the Probate Court or Probate Judge, with a *caveat* as to the constitutionality of such as had not been adjudicated, and a dictum to the effect that the non-judicial functions could not be forced on the judge against his will.¹ To allow him to act or not, as he chose, would not be very satisfactory as a practical matter, and it would be anomalous for any one in the State to be at liberty to disregard a law unless it is void.

But there is a class of cases much more satisfactory than any of these, which negatives completely the right of a legislature to impose extra-judicial duties on the incumbents of judicial offices, without express constitutional warrant. These are the decisions in regard to the right of the other departments of government to call for the opinions of the justices of the Supreme Court on questions of law. The practice, so far as it prevails here, is obviously modelled on that of the English House of Lords, in accordance with which the judges are called upon to give the House their opinion on feigned cases, and nothing is clearer than that these opinions are not binding, and therefore not judicial. About the time the Federal judges had under consideration the question as to their duty under the Pension Act before referred to, President WASHINGTON made a formal request for the opinion of the justices of the Supreme Court on various questions of international and maritime law, and they finally declined to give them,² taking the ground that under the Constitution "neither the legislative nor executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be per-

¹ *In re Johnson*, 12 Kan., p. 104.

² For an account of this correspondence, see 4 American Jurist, 293.

formed in a judicial manner."¹ The case of the United States *v.* Todd² is a decision going practically to this length, and it, with the refusal of the justices, has been accepted as settling the matter under the Federal Constitution. That under such circumstances the judges act merely as advisers to the other departments is the natural inference from the origin of the practice, and such has generally been the conclusion of the State as well as the Federal judges.³ Some half dozen States have provisions in their constitutions authorizing the other departments to call on the judiciary for such opinions. New York, Vermont and Minnesota have statutes purporting to give like authority, but Minnesota has held hers unconstitutional,⁴ and one would expect the same decision with regard to the others if they were contested.

The conclusion seems to be that the definitions which seemed so meagre and insufficient are both accurate and complete. The Federal Constitution describes the judicial power of which it speaks, as extending to all cases in law and equity.⁵ Now, "a case is a controversy between parties which has taken shape for judicial decision,"⁶ and it is the whole of "judicial power," as the words are used in the constitutions, to hear and determine litigated cases, except as other matters may be strictly incidental to that. A hundred years of exposition has merely confirmed HAMILTON's original view of the matter. He says:⁷

"The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be reg-

¹ Letter of JAY, C. J., and others, to President WASHINGTON, concerning the pension matter, 2 Dall., 410 n. ² 13 How., 52 n.

³ Reply of the Judges, 33 Conn., 586; a paper on the Duty of Judges as Constitutional Advisers, 24 American Law Review, 369, collects the decisions, also collating in a note the questions submitted in the various States.

⁴ Application of the Senate, 10 Minn., 78. ⁵ Art. III, Sec. 2.

⁶ JOHN MARSHALL, in a speech in Congress, reported in 5 Wheat. App., 16; also in *Osborn v. U. S. Bank*, 9 Wheat., p. 819.

⁷ Federalist, No. 78.

ulated. The judiciary, on the contrary, has no influence over either the sword or the purse ; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither *force* nor *will*, but merely judgment, and must ultimately depend upon aid of the executive arm for the efficacious exercise even of this faculty.

"This simple view of the matter suggests several important consequences: it proves incontestably that the judiciary is, beyond comparison, the weakest of the three departments of power ; that it can never attack with success either of the other two ; and that all possible care is requisite to enable it to defend itself against their attacks."

With a full appreciation of the fact that enabling the judiciary to defend itself against the attacks of the other departments was the crowning feature of the Constitution he was commending, he called the courts of justice the bulwarks of a limited Constitution against legislative encroachments,¹ and pointed out the subordinate condition of the judiciary department as the defect which elsewhere has left constitutional limitations to the mercy of the legislature. That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty.² The courts are commissioned by the people to maintain this independence as completely as the nature of society and the imperfections of human institutions will permit, and to this end they must, with firmness, but with all due courtesy and forbearance, resist all legislative intrusion into their field, and with equal firmness and courtesy must they decline to exercise forbidden power when it is offered them. Encroachments from either side alike obscure the line, and no encroachment is so easy to oppose as the first.

Topeka, Kansas.

¹ Federalist, No. 78.

² *Ratcliffe v. Anderson*, 31 Gratt., 105.

HISTORICAL STUDIES IN ENGLISH JURISPRUDENCE.

II.

CRIMES AND THEIR PUNISHMENT.

 BY HAMPTON L. CARSON, ESQ.

Having considered some of the rules of practice relating to criminal trials, and the method of procedure, we now turn to the crimes themselves, in order to form an adequate idea of the nature of the English criminal code. It is shocking to find how severe and indiscriminate was the punishment visited upon all classes of offenders. As we dwell upon some strange provisions, we shall be tempted to doubt that such a system ever could have prevailed among a people who loudly boasted in the ears of Europe that they were governed by laws of benign and gentle sway.

The most comprehensive division of crimes is into felonies and misdemeanors. Felonies embraced all offences that were punished by death by custom, and included all the crimes of highest grade, from treason and murder to robbery and breach of prison. The punishment attached to felonies, where the offender could not claim the benefit of clergy (which was an exemption from temporal punishment on the ground that the offender was in holy orders, of which the test in early days was ability to read), was death by hanging, forfeiture of lands and goods and corruption of blood. The benefit of clergy was not permitted to high treason nor to misdemeanors, and in the former the death punishment was added to by the sentence that the felon should be drawn and quartered. The phrase "felony without benefit of clergy" practically meant a crime punishable by instant death.

Misdemeanors embraced all the lower grades of crime, from assaults and batteries to perjury and libel. The punishment was generally by fine and imprisonment, sometimes by transportation for life or years.

In addition to these there were many offences falling

within one class or the other by special legislative enactment.

The Common Law, or that great body of customs which owed their validity to the antiquity of their observance, and not to any solemn enactment of Parliament, was not a savage or a bloody code, considering its ancient origin and the barbarism of the tribes among whom it prevailed. In Saxon times human life was rarely forfeited, as blood could be atoned for by money, and each man, according to his station, had his price. As time went on, and civilization increased, and wealth and commerce grew, the government or Court party, or whatever party held the reins of power, became more and more cruel. Crimes punishable by death were created by the score, until the catalogue became an appalling one both as to the number and character of the offences. The marvel is that one generation never repealed the laws of their predecessors; and so the mass went rolling on from century to century, augmenting in bulk, black with terror, heartsickening in its atrocities. The bigotry of kings, the avarice of queens, the ambitious plans of the nobles, the fanaticism of the clergy, the selfish pleasures of the rich, the jealousies of landowners, the brutality of sheriffs, the greed of gaolers, and the interests of scheming monopolists, alike demanded victims and cried out for blood. Whether a man purveyed victuals without warrant, or imported "false and evil coin," whether he stole a falcon or concealed a hawk, or exported wools, leather or lead, the laws of EDWARD I, EDWARD III and RICHARD II inflicted upon these offenders the frightful punishment of death. Yet two of these kings were men who, fired by holy zeal, caught up their arms to battle with the Saracen for the sepulchre of Him who taught "peace on earth and good will towards men."

In a statute of HENRY IV we have a singular instance of royal avarice making war upon the ignorance of the alchemists, who vainly pretended to transmute all metals into gold. The law provided that "none from thenceforth shall use to multiply gold or silver, nor use the craft of multiplication, and if any do he shall incur the pain of

felony." It is stranger still to see, at a much later day, the triumph of knowledge over credulity still tainted with cupidity; for when it was found that smelters feared to exercise their art of refining metals, lest they should incur the penalties of HENRY'S law, WILLIAM and MARY repealed the statute with this proviso, "that the gold or silver extracted by the art of smelting should be carried to the Tower of London, for the making of monies, and be not otherwise disposed of."

In the reign of ELIZABETH, if any one forged a deed or will with the intent to defeat the interest of any person in lands, he was to be placed upon the pillory, have both his ears cut off, his nostrils slit and seared with a hot iron, to be imprisoned all his life and forfeit all the profits of his lands. As late as the days of GEORGE II, one Japhet Croke, *alias* Sir Peter Stranger, was convicted of forging a deed, and suffered all the penalties of the Act.

No new felonies were created in the reign of CHARLES I. In reviewing the succeeding reigns we can only select instances here and there to show the spirit and temper of the times. The following are some of the offences which English kings and queens, lords and commons, thought worthy of the death penalty: to maliciously burn stacks of corn or kill cattle in the night; to personate bail; to counterfeit lottery tickets, stamps, exchequer bills or the seal of the Bank of London; to blanch copper and mix it with silver; to assault a privy counsellor in the execution of his office; to steal a pump from any ship; to burn a wood or coppice; to return from transportation; to take a reward for helping to the recovery of stolen goods; to tear, spoil or burn the garments of any one in the street, or to engage in smuggling.

What rich material is here awaiting the historian and the moralist! What livid colors for the brush of some literary Turner!

In 1736, in the reign of GEORGE II, the list had grown longer and blacker. To appear in disguise in any forest, park, road or heath, and wound or kill a red deer; to rob a warren of rabbits; to steal fish out of any river or pond;

to cut down a tree in any avenue or orchard; to set fire to any house or barn—these acts were punished by death. This was the famous Black Act. To send threatening letters, anonymous or signed by fictitious names, demanding money, venison or other valuable thing; to break down turnpike gates or fences; to steal lead or iron; to damage Westminster bridge; to enlist in the service of any foreign prince without His Majesty's leave; to steal sheep or cattle; to hold correspondence with the sons of the Pretender; to steal linen, fustian or cotton goods from bleaching fields; to cut or destroy velvet in the loom, or to destroy any tools used in the weaving of velvet; to counterfeit any stamp used in the duty on hats; to forge any debenture bond relating to the duties of excise upon beer and cider, hides, skins, and the drawbacks on wines, sweets and ale licenses, and to steal from the person to the value of five shillings—all these were punished by the dreadful penalty of death.

Yet this was the England of SHAKESPEARE and PHILIP SIDNEY, of HALE and MILTON, of ADDISON and POPE, of BURKE and WILBERFORCE and HANNAH MORE!

In the year 1810—within the lifetime of many now alive—Lord HOLLAND, in a debate in the House of Lords, declared that no less than three hundred and thirty-four offences, among the variety of actions that men were daily liable to commit, were punishable by death. These laws had been rigidly enforced. The State trials are filled with the despairing shrieks of thousands of legally-butchered men and women. In the time of HENRY VI more persons were executed in England in one year, for highway robbery alone, than the whole number executed in France in seven years. In the reign of HENRY VIII seventy-two thousand thieves were hanged, at the rate of about two thousand a year. In the year 1685—that awful year, which reddens in the sight as that of the Bloody Assizes—the pitiless and ferocious JEFFREYS executed hundreds of men and women against the law and the evidence. Whole counties were covered by the gibbeted remains of human beings, the air was poisoned by the stench of rotting limbs, and belated trav-

ellers, hurrying o'er the heaths, were startled at each lonely crossroad by swaying bodies hung in chains and glistening in the moonlight with ghastly horrors! In 1763 frequent mention is made, in the books, magazines and newspapers, of the bodies of malefactors, conveyed after execution to Black Heath, Finchley and Kennington Commons or Hounslow Heath, for the purpose of being there permanently suspended. "In those days," says a recent writer, "the approach to London on all sides seems to have lain through serried files of gibbets, growing closer and more thronged as the distance from the city diminished, till they and their occupants arranged themselves in rows of ghastly and grinning sentinels along both sides of the principal avenues. And, by way of a high temple of the gallows, in a central point toward which all these ranges might be supposed to converge—like the temple at Luxor amid its avenue of Sphinxes, or rather, like the blood-stained shrine of Mex-itli, in the centre of the capital of Montezuma—stood Temple Bar with its range of grinning skulls, beneath which, when the gory heads were first stuck up, Horace Walpole saw the industrious idle of the city lounging with ample store of spy-glasses, through which passengers were allowed to peep at them for the small charge of one-half penny."

In 1785, in the reign of GEORGE III, no less than ninety-seven persons were executed in London for the offence of shop-lifting; and in 1816, at the very time when Sir SAMUEL ROMILLY was pleading for the repeal of this sanguinary law, there was a child in Newgate Prison, not ten years of age, under sentence of death for stealing. The Recorder of London was reported to have said that "it was intended to enforce the law strictly in the future, to interpose some check, if possible, to the increase of youthful depravity."

English conservatism was strongly stubborn, and resisted for years all movements of reform. The scalding tears and flowing blood of thousands of unhappy victims had failed to thaw the frozen heart of justice. We have not the space within the limits of this paper to trace the history of the amelioration of the criminal code. Humanity

triumphed; the self-sacrificing labors of HOWARD, the caustic wit of SYDNEY SMITH, the eloquence of BROUGHAM, the white-souled philanthropy of ROMILLY, acting on the quickened intelligence and sensitive conscience of the nineteenth century, prevailed at last, and this barbarous code, with all its attendant horrors, passed into history, fit only to be compared to that regulation of the Inquisition which denied to suspected heretics the assistance of the law.

We now go back, in point of time, to glance at a few laws that owed their origin to horror of the black arts. To no other source can be attributed the statutes against rogues and vagabonds; for to be found in the company of those calling themselves Egyptians, though nothing more than gypsies, for the space of one month, was visited by death. The language of the statute of 22d Henry VIII, is curious and worthy to be quoted. It reads as follows: "An Act for the avoiding and banishing out of this realm of certain outlandish people, calling themselves Egyptians, using no craft nor feat of merchandise for to live by, but going from place to place in great companies, using great, subtil and crafty means to deceive the King's subjects bearing them in hand, that they, by palmistry, could tell men's and women's fortunes." They are then banished from the realm under pain of death. Superstition and cruelty could scarcely go farther than this.

In the first year of the reign of JAMES I, it was enacted that "if any person shall use, practise or exercise any invocation or conjuration of any evil or wicked spirit; or shall consult, entertain, employ, feed or reward any wicked or evil spirit, to or for any intent or purpose; or take up any dead man, woman or child out of his or their graves or any other place, or the skin, bone or any other part of any dead person, to be employed in any manner of witchcraft, sorcery, charm or enchantment, whereby any person shall be killed, destroyed, wasted or consumed, pained or lamed in his or her body or any part thereof, every such person or persons, their aiders, abettors and counsellors, being thereof convict and attain, shall suffer death as a felon without clergy." Or if any one should undertake, by witchcraft, to tell where

treasures of gold or silver could be found, or where stolen goods could be recovered, or cast a spell on anyone, or whereby the cattle or goods of a person shall be wasted or destroyed, he shall, upon conviction of a first offence, suffer imprisonment for one year, and once a quarter stand two hours in the pillory; and if convicted of a second offence he shall die a felon's death.

Under this law many trials and executions took place. The great and pure name of Sir MATHEW HALE is stained by his actions upon the trials of the witches at Bury St. Edmund's in 1662. It is not, perhaps, to be wondered at in that dark age that the mind of the judge was unable to cast off the thrall of superstition, because he openly declared that Holy Writ had said "Thou shalt not suffer a witch to live;" but it is strange as well as sad to see how completely nervous dread had paralyzed his powerful mind, for he failed to enforce the rules of evidence, of which he was so great a master, so as to connect the prisoners with the charge. Had he done so, their lives would have been spared. The trials are very interesting, but we can only allude to them in a few words.

The charge was that Amy Dory and Rose Cullender, two wrinkled old women, had bewitched several children. The mother of one child had left her infant for the day with one of the old women, and at night he fell into such strange fits of swooning that the mother was much frightened. She went to a Doctor Jacob, who told her to hang the child's blanket up in the chimney corner all day, and at night, when she put the child into bed, to put it into the blanket, and if anything fell out to throw it into the fire. And when she took the blanket down a great toad fell out, which hopped up and down the hearth, and she cast it into the fire, and after sputtering for awhile, "there was no more seen than if there had been none there," and after the toad was burned the child recovered and was well.

The other children were said to have cast up pins and nails, and to have become speechless whenever Amy Dory touched them. The children had also, at some previous time, declared that the witches had visited them in the

form of a bee and a mouse. At times the children would see things run up and down the house like poultry or mice, "and one of them screeched out like a rat when touched by the tongs." There was no evidence at all to connect the so-called witches with these silly fancies; the evidence rested on the simple hearsay evidence of the declarations of the children, who would not or could not themselves testify in Court, because some of them were too sick to be brought there and the rest were said to be speechless. Then the famous Dr. THOMAS BROWNE, of Norwich, the author of the "Religio Medici," and a man of great knowledge and repute, was put upon the witness-stand. He was clearly of opinion that the children were bewitched, "because in Denmark there had been a great discovery of witches who afflicted people by conveying pins into them, and needles and nails." Then comes an expression of opinion that would shame some of our modern experts: "The devil in such cases did work upon the bodies of men and women upon a natural foundation; that is, he stirred up and excited humors in the body to great excess, whereby he did, in an extraordinary manner, afflict them with distemper, but only heightened by the subtlety of the devil, co-operating with the malice of the witches who instigate him to villainy."

This learned nonsense appeared to be sufficient to satisfy the judge, until some ingenious person suggested that the children might be guilty of deceit; and so they were blindfolded and told that the witches were approaching, and then another person touched them, which produced the same effect as the touch of the witch, by throwing them into fits. "This put the Court and all persons into a stand," until it was remarked that possibly the children might be deceived by a suspicion that the witches had touched them, when they did not. This shrewd suggestion removed all doubt, but evidence was still further produced that Rose Cullender must be a witch, because two years since a carter had run his wagon against her house, and she was angry and must have bewitched his cart, because it upset several times during the day, and his horses afterward died.

The judge, instead of telling the jury that there was absolutely no evidence to show that the prisoners were guilty, briefly declared that witchcraft existed, and that he would not repeat the evidence, which he desired them strictly to observe, "for to condemn the innocent and to let the guilty go free were both an abomination to the Lord." In half an hour the jury convicted them, and at the same time the children recovered their speech and health, and slept well that night, "only little Susan Chandler felt a pain like pricking of pins in her stomach." The Court gave judgment that the witches be hanged.

Thus superstition opened wide her main, and fed upon the bodies and the minds of men. We smile at the learned folly of those days; we marvel at the helplessness of so great a judge, and are startled at the ignorance of so distinguished an ornament of learning as Sir THOMAS BROWNE, when we remember that this was the age of MILTON, LOCKE, and WILLIAM PENN; but as late as 1711 we find Mr. ADDISON, in the *Spectator*, avowing his belief that there is such a thing as witchcraft, and many years after the Statute of 9th George II had forbidden prosecutions for witchcraft, Sir WILLIAM BLACKSTONE boldly declared his belief that Mr. ADDISON was right.

Let us now look at a few examples of fanaticism. There was an ancient writ, known to the Common Law, by which heretics were burned—the *De Hæretico Cimbarendo*. It was not very well determined who had the authority to convict of this offence, nor did the laws declare very specifically what constituted the offence. In the reign of HENRY IV the seeds of the Reformation had begun to spread under the name of Lollardy, and the clergy sharpened to its keenest edge the axe of persecution. Statutes were passed and repealed and re-enacted as Protestants and Catholics in turn ascended the throne. The Six Bloody Articles were established. The opposers of transubstantiation were sentenced to be burnt by fire; and those denying communion in one kind, celibacy of the clergy, monastic vows, the sacrifice of the Mass and auricular confession, were to suffer death as felons. In the reign of PHILIP and

MARY, Cardinal POLE was sent from Rome to call the realm back into the right way, from which it had strayed. Statutes were passed for the repressing of heresies and the enormities of Lollardy, while all statutes against the See of Rome were repealed. The first act of ELIZABETH was to restore all ancient jurisdictions to the crown, to repeal all former statutes and abolish all foreign power. Jesuits and priests were ordered to depart, and forbidden to return to the realm. The penalty for receiving them was felony without clergy. Persons were punished for obstinately refusing to come to church, or for persuading others to impugn the Queen's ecclesiastical authority. Popish recusants were subjected to penalties for removing to a greater distance than five miles from the places of their abode. The laws of ELIZABETH were less severe than those of her predecessors, but the writ for burning heretics remained in force, and the most recent instances of its being put in execution were upon two Anabaptists in the seventeenth year of her reign, and upon two Arians in the ninth year of JAMES I.

Ignorance, superstition, intolerance and bigotry led monarchs to believe that they alone held the lamp of truth, while all others wandered in utter darkness; and so they gravely set themselves the task of solving the problem, as stated by BECCARIA, that, given the force of the muscles and the sensibility of the nerves of a conscientious man or woman, it is required to find the exact degree of pain necessary to extort a confession of heresy, or to work a change of religious convictions. Strange that it should have cost the world centuries of woe before men could learn that fire can never burn the conscience into ashes, that persecution can never rack the bones of truth, and that bigotry can never seal the prison doors of liberty! It is also strange that the most fiendish passions of the heart have been those kindled in the name of religion.

The old Saxon idea, embodied in the ordeal, of appealing to Heaven for a decision upon earthly questions, took shape in the Norman trial by battle, which was the recognized method of determining the ownership of land. The

champions of the parties to the suit contended with each other in lists, enclosed like those of chivalry, from sunrise until the stars appeared in the evening, with staves an ell long, and a leathern target, in the hope that victory would be awarded unto him to whom the right belonged. A celebrated case of this kind occurred in the reign of ELIZABETH. None else was known until 1818, when in the case of *Ashford v. Thornton*, where the defendant insisted upon his right to wage battle under the law, Lord Chief Justice CAMPBELL decided "that the law of the land was in favor of the trial by battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be." The public horror and disgust, which led to the passage of an Act of Parliament changing the law, are well described in HENRY CRABBE ROBINSON'S *Diary*.

Two curious enactments of PHILIP and MARY challenge attention. One provided that whoever wore silk on his hat, girdle, scabbard, hose, shoes, or spur leather, should be imprisoned for three months and forfeit ten pounds. The other furnished a convenient means of replenishing an exhausted exchequer by compelling persons convicted of speaking false and malicious scandal of the king or queen, to stand in the pillory and lose their ears, or else pay one hundred pounds to the queen.

Several centuries later, laws were passed against buying up provisions in a market for the purpose of selling them again, which constituted the offences of forestalling and regrating, and were forbidden because the price of food might be increased.

In the long list of offences thus hastily reviewed, stretching from the time of EDWARD I to WILLIAM IV, a period of more than five hundred years, we have seen reflected as in a mirror some of the features of the English people: their brutality, their avarice, their superstition, their fanaticism, their hatred, their fears, their pleasures, their tyrannies, their ignorance of human nature, of political economy, and of the laws of trade. It is not an agreeable picture, we confess, but it is none the less true, and will only add to our appreciation of the many noble and heroic traits which exist in English character.

"The laws," says the celebrated BECCARIA, "are always several ages behind the actual improvement of the nation which they govern." This observation, while true of law in general, is particularly true of the criminal law.

SUPREME COURT OF TENNESSEE.

NASHVILLE TRUST CO. *v.* FOURTH NATIONAL BANK.

SYLLABUS.

Assignment for Benefit of Creditors—Set-off in Insolvency.—A bank held the notes of a depositor who became insolvent and made an assignment for the benefit of creditors. *Held*, that the bank had a right to set off the notes against the deposit, although the assignment occurred before their maturity.

The facts are sufficiently stated in the opinion of the Court.

E. H. EAST, ESQ., and J. C. McREYNOLDS, ESQ.,
for appellants.

Messrs. DICKENSON and FRAZER for appellee.

OPINION OF THE COURT.

PITTS, Special Judge.—The Connell-Hall-McLester Company, a Tennessee mercantile corporation located at Nashville, executed a general assignment to the Nashville Trust Company, for the benefit of creditors, on the 4th day of June, 1891. The deed of assignment conveyed to the assignee all the property and assets belonging to the assignor company, schedules being annexed under oath, specifying, among other things, all moneys on deposit in the Fourth National Bank of Nashville. At the date of the assignment the assignor company had on deposit, subject to its check, in said bank, \$5,222.66, and the bank held its four notes for borrowed money, due as follows:

One due July 3, 1891, for	\$10,000 00
One due July 17, 1891, for	4,500 00
One due July 19, 1891, for	9,000 00
One due August 22, 1891, for	4,500 00
Making total of	\$28,000 00

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The bank, after the assignment was made and noted for registration, and on the same day it was made, with knowledge of the assignment, applied said deposit to the credit of the assignor upon its indebtedness to the bank on the above-stated notes. Within three days after the assignment the assignee drew its check upon the bank for the amount of the deposit, caused the same to be presented for payment, and payment was refused. The assignor is insolvent, and was insolvent at the date of the assignment, and will not pay its debts in full. On the 4th day of December, 1891, the assignee and the Fourth National Bank submitted an agreed case to the Chancery Court at Nashville for decision upon the foregoing facts; the assignee claiming, as stated in the agreed case, "that it had the right to collect the deposit, and that it still has such right, or, if it has not this right, that, in the *pro rata* distribution of the proceeds of the assets among the creditors of the Connell-Hall-McLester Company, it has the right to charge said bank with the sum so on deposit and appropriated, as so much cash received on its *pro rata* share of said proceeds upon its debt of \$28,000;" and the bank claiming "that it had the right to appropriate said deposit in payment on said notes, prove its debt for the balance, and collect its *pro rata* share of the trust fund on said balance as other creditors, and that it now has such right." These questions were submitted for decision, with the agreement that costs should be paid by the losing party. The Chancellor held for the defendant, the bank, grounding his decision upon the doctrine of equitable set-off, and the complainant has appealed.

Two questions are now presented for decision. The first is whether the doctrine of equitable set-off applied, and gave to the bank, immediately upon the assignment being made and the insolvency of the assignor established, the right to have the deposit credited upon or allowed as a set-off against the indebtedness of the assignor not then due. The complainant's counsel argues, with much force and plausibility, that the mere fact that one of the parties to independent cross-indebtedness is insolvent constitutes

no ground for equitable set-off; that some connection of dependence, or "mutual credit," in addition to insolvency, is essential; that more especially is this so when the indebtedness of one of the parties is not due, and that, too, of the party who is seeking to obtain the set-off; that to apply the doctrine of set-off to such a case would be to allow a party to collect a debt before it is due, without the consent of his debtor, and thus violate the contract which the parties have made; and that in this case such a result would give the bank a preference over other creditors of the assignor, and violates the statute which provides for the equal *pro rata* distribution of the assets of insolvent debtors under general assignments, as well as the like statutory provisions in regard to insolvent corporations. On the other hand, it is argued with equal force and plausibility for defendant that insolvency is, of itself, a sufficient ground for equitable set-off, without any connection or "mutual credit" between the debts or parties; that connection and insolvency are separate and distinct grounds for such relief, each being alone sufficient; that, where insolvency exists, it makes no difference that the indebtedness on one side is not due, nor which party is insolvent, —whether the party seeking the set-off or the party resisting it; that, under the statutes providing for the equal *pro rata* distribution of the assets of insolvent persons and corporations, the assets of the insolvent, in respect to choses in action, are only the balances due the insolvent estate after deducting all proper credits, counterclaims and set-offs, as its liabilities are only the balances due from it, ascertained in like manner, and therefore that to allow the set-off claimed in this case is not to disturb, but to preserve and enforce, equality among creditors; and that to refuse it would be to give other creditors a preference over the bank, and work injustice to the latter by compelling it to pay in full what it owes to the insolvent, and take a *pro rata* on what the insolvent owes it.

The second question is, the indebtedness on both sides being due when the agreed case was filed, whether the bank has the legal right of set-off. On this question, in

addition to the contentions already suggested, it is insisted for complainant that the rights of the parties were fixed at the date of the assignment, and, the bank having no right to set-off at that date, it has not such right now; that the lapse of time did not enlarge defendant's right in this respect; and that the assignee represents the creditors of the assignor, and not the assignor only; and therefore that the assignee is not to be regarded as standing in the shoes of the assignor simply. On the other hand, it is insisted for defendant that the assignee takes, not only as a volunteer, subject to all the equities existing against the assignor, and not as a purchaser for value, but also as the personal representative of the assignor, and stands for and in the place of the assignor in all respects, except as to personal liability; that the agreed case is, in effect, a suit to recover the deposit by the Connell-Hall-McLester Company, by its assignee and personal representative, and that, the debts being mutual and all due, the bank has the legal right of set-off to the extent of the deposit.

Opposed as they are to each other, the positions of counsel are each supported by apparently well-considered cases on both of the general questions stated; but no adjudication of this Court, upon a similar state of facts, has been cited, nor is the Court aware of any case in this State in which the precise questions here raised have been decided. The adjudged cases in this country and in England, and the text-books founded upon them, are in hopeless and irreconcilable conflict on many of the points involved. Any effort to reconcile them would be utterly futile. There is no touchstone of reason that will distinguish and harmonize them upon any general principle applicable to all of them, for their antagonism is not apparent, simply, but real and fundamental. They but furnish one of the many illustrations of that diversity of judgment which is inherent in the minds of men, which often, out of substantially similar raw materials and general conditions, has founded and built up dissimilar systems of jurisprudence, and which too often proves a delusion and snare to the worshipper of mere precedent. We must therefore look for guidance to

our own State on the general subject, and to the principles involved, which appear to be sustained by reason and the weight of authority; and, first of all, it must be remembered that the doctrine of set-off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity which dictates that the demands of parties, mutually indebted, should be set off against each other, and only the balance recovered, that gave birth to the idea of accomplishing the result in a judicial proceeding. The common law, for simplicity of procedure, determined otherwise, and held that each claim must be prosecuted separately. "The natural sense of mankind," says Lord MANSFIELD, "was first shocked at this in the case of bankrupts; and it was provided for by 4 Anne, Ch. 17, § 11, and 5 Geo. II., Ch. 30, § 28."¹ "In pursuance of these old statutes, and of the dictates of equity," says the Supreme Court of the United States in *Carr v. Hamilton*,² "the principle of set-off between mutual debts and credits has, for nearly two centuries past, been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute book; and it mattered not whether the debt was due at the time of bankruptcy or not,"—citing authorities.

The jurisdiction of courts of equity over the subject of set-off was exercised before there was any statute upon the subject,³ and has often been applied in cases not within the statutes.⁴ By the civil law, from which the great body of our system of equity comes, a cross-debt was, by mere operation of law, without any act of the parties, extinguished. It was treated as an absolute payment. Courts of equity in this country, while not going so far, have accomplished the same results in numerous cases, by granting

¹ *Gree v. Farmer*, 4 Burrows, 2214, 2220, cited in 2 Story, Eq. Jur., § 1433.

² 129 U. S., 255, 256; 9 Sup. Ct. Rep., 295.

³ *Hawkins v. Freeman*, 2 Eq. Cas. Abr., 10; *Chapman v. Derby*, 2 Vern., 117.

⁴ *Williams v. Davis*, 2 Sim., 461; *Ex parte Prescott*, 1 Atk., 331; *Lanesborough v. Jones*, 1 P. Wms., 326; *Greene v. Darling*, 5 Mason, 207.

perpetual injunctions against judgments in favor of insolvent persons who were indebted in larger amounts to the judgment debtor,¹ and in other cases, where, on account of the non-residence of the judgment plaintiff, or for other reason, the defendant could not save the demand due himself except by setting it off against the judgment.² The Court, in all such cases, is governed, not by the statute of set-off, but by the general principles of equity,³ and the general principle of equitable set-off seems to be allowed where the party claiming it appears, in good conscience, to be entitled to it, and no superior equity in favor of the party resisting it will be thereby defeated.⁴ The same author says: "The natural equity, to have mutual, but unconnected, demands, between two parties who have been dealing with each other, set off, is, as a general rule, superior to the claim of any other creditor who has not dealt with the insolvent upon the faith of specific fund against which the right of set-off is claimed."⁵ With these general principles in view, we proceed to examine the reasons urged in arguments for and against the application of the doctrine of equitable set-off in this case.

And, *first*, as to the capacity in which the complainant stands before the Court. Is the Nashville Trust Company to be regarded as standing in the shoes of its assignor, the Connell-Hall-McLester Company, or upon different and higher ground? On the first point the authorities are in harmony; but we are of opinion that reason and the weight of authority support the view that an assignee for the benefit of creditors takes the choses in action of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all the defences and equities existing against them in the hands of the assignor; and not only so, but that he holds as the representative of the assignor

¹ *Brazelton v. Brooks*, 2 Head, 193; *Hough v. Chaffin*, 4 Sneed, 238.

² *Gregory v. Hasbrook*, 1 Tenn., Ch. 220; *Edminson v. Baxter*, 4 Hayw., Tenn., 112; *Wat. Set-off*, § 431.

³ *Jeffries v. Evans*, 43 Amer. Dec., 158.

⁴ *Wat. Set-Off*, § 439.

⁵ *Ibid.*, § 438.

and his estate, and in this respect is to be distinguished from a particular assignee, holding for himself, either as volunteer or purchaser.¹ He receives the legal title, not for himself, but in trust, to collect and disburse to creditors. All rights of action of the assignor pass to him for this purpose; and to all suits against the assignor's estate, and which are to affect the assets in his hands, he must be a party. This is the estate, and these are the functions, of an ordinary administrator or personal representative. It is frequently said of such an assignee that he represents the creditors, as it is said of an administrator, where the estate is insolvent, that he represents creditors, and, where it is solvent, that he represents distributees; and in the sense in which it is so said it is true. But by this is manifestly meant no more than that the representative's ultimate accountability is to the classes of persons who stand to him in the relation of beneficiaries, who are ultimately to receive the fruits of the trust he is administering, whether it be the estate of a living or dead person or that of a corporation. His right to maintain suits upon the choses in action, passed to him from the assignor by the assignment, obviously rests upon the fact that he represents the assignor, in whom were vested originally the title and right of action. This title and this right of action were never vested in the creditors, and did not come to the assignee from them.

Secondly, as to insolvency. Is insolvency of itself a sufficient ground for the application of equitable set-off? "It is deducible from the general scope of the authorities," says Mr. WATERMAN, "that insolvency has long been recognized as a distinct equitable ground of set-off."² Numerous authorities are cited by the learned author, but it is

¹ Burrill, Assignm., § 391; *Receivers v. Paterson Gas-Light Co.*, 23 N. J. Law, 283; *Saunders v. Nevil*, 2 Vern., 428, note 1; *Mitford v. Mitford*, 9 Ves., 100; *Brown v. Heathcote*, 1 Atk., 162; *Clason v. Morris*, 10 Johns., 540; *Murray v. Lylburn*, 2 Johns., Ch. 443.

² Wat. Set-Off, § 432.

not deemed useful or necessary to review them, as this Court has repeatedly so held.¹

Thirdly, as to the fact that the indebtedness on one side is not due when the set-off is claimed. It seems to be conceded by counsel for complainant that the indebtedness from the party claiming the right of set-off is not due would constitute no obstacle, as he might be allowed, if he chose, to expedite payment of a debt due from himself, without doing any injustice to the opposite party. But, it is earnestly insisted that it is quite different where it is the debt against which the set-off is claimed that it is not due; that in such case to allow the set-off, and thereby compel payment of a debt not due, without the consent of the debtor, is to violate the contract of the parties, and work injustice to the debtor, whose demand is thus anticipated and collected before maturity. The argument is persuasive, and not without the support of respectable authority. *Spaulding v. Backus*,² *Hannon v. Williams*,³ *Jordan v. Bank*,⁴ *Lockwood v. Beckwith*⁵ and *Wat. Set-Off*⁶—all seem to support this position, as do other cases not cited. The most of these and like cases seem to be, and many of them are, expressly based on the principle stated and illustrated in *Poth*,⁷ as follows: "I am your debtor for six pipes of wine, of a particular vintage; you are my debtor for six pipes of wine generally. I may demand the six particular pipes, and therefore you cannot offset the general debt for six pipes; but I may offset my particular pipes, if I please, against yours, because I could turn them out to you in payment of the general debt." It is obvious that this illustration does not involve any principle of equitable set-off. It is only the statement of the general principle, applicable, not only to the law of set-off,

¹ *Brazelton v. Brooks*, 2 Head, 193; *Hough v. Chaffin*, 4 Sneed, 238; *Gregory v. Hasbrook*, 1 Tenn., Ch. 220; *Edminson v. Baxter*, 4 Hayw. (Tenn.), 112; *Richardson v. Parker*, 2 Swan, 529; *Moseby v. Williamson*, 5 Heisk., 287; *Comfort v. Patterson*, 2 Lea, 670; *Machine Co. v. Zackary*, 2 Tenn., Ch. 478; *Catron v. Cross*, 3 Heisk., 584; *Smith v. Mosby*, 9 Heisk, 501; *Piedds v. Carney*, 4 Baxt., 137.

² 122 Mass., 553.

⁶ 6 Mich., 168.

³ 34 N. J. Eq., 255.

⁶ 22 131, 132.

⁷ 74 N. Y., 467.

⁷ Obl., 590.

but to contracts as well, that an obligation payable in one commodity cannot be paid in another without the consent of the payee. At most, as applied to the case in hand, it means that a debtor whose debt is due has no right, nothing more appearing, to set off against it a debt in his favor, not due; but this is only stating a general rule of legal set-off, everywhere conceded. The fact of insolvency of one of the parties is not involved. In the absence of insolvency, or some equivalent equity, it will not be anywhere contended that a debt not due can be set off against a debt that is due, any more than that six pipes of wine generally can be set off against six particular pipes of wine.

The case of *Spaulding v. Backus*, *supra*, relied on for the distinction under consideration, is not, strictly, an authority for the position; for while the learned Court does approve the distinction that a party cannot anticipate payment of an unmatured debt to himself, by setting off against it a debt due from himself, presently payable, notwithstanding the insolvency of the complainant, the suit in that case was by or for the benefit of an assignee by purchase, and the real question was whether a debt owing by the defendant to the assignor at the date of the assignment, though not then due, was to be regarded as an equity so attached to the assigned debt as to carry with it the right of set-off as against the assignee with notice of assignor's insolvency. The holding in the negative is not necessarily inconsistent with the right of set-off as between the original parties, and appears entirely consistent with the decisions of this Court, that a right of set-off, to be so attached to the debt as to be available against it in the hands of an assignee for value, must be complete and perfect at the date of the assignment. *Gatewood v. Denton*,¹ *Litterer v. Berr*,² *Catron v. Cross*,³ *Lockwood v. Beckwith*, *Jordan v. Bank*, *Hannon v. Williams*, do fairly hold the proposition contended for by complainant's counsel. The effect of the sections cited from *Wat. Set-Off* is that the set-off will be allowed where the debt not due is in favor of the party against whom the right of set-off is asserted. It is only by implication that the learned

¹ 3 Head, 381.² 4 Lea, 193.³ 3 Heisk., 584.

author can be treated as against the right in cases like the present. We cannot agree with these authorities, either in their reasoning or result. The question is, assuming the insolvency of the party owing the unmatured debt, can his debtor, when sued by the insolvent on a debt which is due, set off against it, in equity, the unmatured debt, because of the insolvency? We are of opinion that both reason and the weight of authority answer in the affirmative.

In connection with the general principle of equity before alluded to, that a set-off will be allowed when the party appears in good conscience to be entitled to it, and where no opposing equal or superior equity will be defeated—and we are treating the case now upon the idea that it is only the insolvent himself that is resisting—it must be remembered that it is only where, for some reason, the law cannot avail the party that equity intervenes at all. If both parties were solvent, so that both debts might ultimately be collected, the law would afford adequate relief, and no injustice would be wrought to either party. The one could not suffer by having to pay his own debt according to his contract, if he could ultimately compel the other to pay his debt according to his contract. But it is this very fact that, if the one pays the debt due from him, he cannot compel payment of the debt due to him, and will thereby suffer irreparable loss, and his inability to protect himself by set-off at law because his debt is not due, that create his equity, and the necessity for equitable relief. Does it lie in the mouth of an insolvent to say that his contract is violated, and thereby defeat so manifest an equity, when it is apparent that he cannot himself perform that contract? Should a court of conscience be so overscrupulous of the rights of one party to a contract as to refuse to permit a slight variance, even as to him, when it can plainly see that thereby it will wholly destroy the contract as to the other party? Technicalities are not to be so sweeping in their consequences. This Court looks to the substance, and not to the shadow of things. It is the very fact that the contract cannot be performed literally as made that calls upon the Court, *ex æquo et bono*, to compel such substantial performance as is possi-

ble. But it will be found, upon examination, that this objection may be urged with equal force in almost, if not in every case where the doctrine of equitable set-off has been applied. Take, for example, the cause of a judgment on the one side and a simple contract debt on the other. The judgment plaintiff is entitled to immediate execution and to collect his money at once. He does not have to await the law's delay and the expense of litigation. He has not only the right to demand his money, but to compel payment at once by final process, before the defendant can possibly obtain judgment, and place himself on equal footing in respect to the debt due him. He must await the delay of legal proceedings while the plaintiff in the judgment may, in the meantime, in the exercise of not only a contract right, but a contract right sanctioned by the final judgment of the court, proceed to collection at once. And yet it has never been considered that this right of a judgment plaintiff, if he is insolvent, stands in the way of equitable relief to the other party by injunction and set-off, although it cannot be said that there is here any less violation of the clear legal right than there is in setting off a debt not due against one that is due and payable.

The right of set-off in such and like cases is sanctioned by many authorities. In *Jones v. Robinson*,¹ approved in 2 Wat.,² it appeared that Jones had to his credit in bank a deposit of \$924, at the time the bank failed and a receiver was appointed, and the bank held Jones' note for \$391.43, which matured three days after the receiver was appointed. Held set-off proper. In *Fera v. Wickham*,³ reported in 15 N. Y. Supp., 892, the right of set-off was upheld in a case like this, except that the parties were natural persons instead of corporations. In *Schuler v. Israel*⁴ the Supreme Court of the United States approves the same doctrine in a garnishment proceeding; the syllabus, fairly supported by the opinion, on this point being: "A garnishee has a right to set up any defence against the attachment process which

¹ 26 Barb., 310.

² Corp., § 371.

³ Sup. Ct. N. Y., Oct., 1891.

⁴ 120 U. S., 506; 7 Sup. Ct. Rep., 648.

he could have done against the debtor in the particular action, and if the debtor be insolvent, and owes the garnishee on a note not due, for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process." The facts appearing in the answer of the garnishee, he was discharged. In *Carr v. Hamilton*¹ the same doctrine was applied between an insolvent life insurance company and the holder of an unmatured endowment policy, who was also indebted to the company for a loan, past due at the date of insolvency. In *Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank (Ky.)*² the doctrine was applied by the Supreme Court of Kentucky in a case precisely similar to this. Referring to the particular question now under consideration, the Court in that case say: "It is unquestionably the law that, as between individuals, the right of equitable set-off exists, although the debt had not matured at the time of the insolvency. Ordinarily, of course, a debt not due cannot be set off against one already due. To allow it would be to change the contract and advance the time of payment. But where the party asserting the due debt is a non-resident, or becomes insolvent, then either of these conditions, *ipso facto*, gives to the other party the right of equitable set-off, although his debt had not matured when the debtor became insolvent or the conditions arose giving the right of equitable set-off." We conclude, therefore, that insolvency is a good ground of equitable set-off, even where the indebtedness on one side is not due, and that it makes no difference in which party's favor is the unmatured debt. The supposed hardship or injustice resulting from the anticipation of the unmatured debt may and should be wholly obviated by discounting it, or adding interest to the due debt for the unexpired time of the debt not due, and in this way equalize the interest.

Fourthly, as to the effect of the statutes providing for the equal and ratable distribution among creditors of the assets of insolvents under general assignments, and of in-

¹ 129 U. S., 252; 9 Sup. Ct. Rep., 295.

² 13 S. W. Rep., 910.

solvent corporations. Without elaborating this question, it is sufficient to say we are of opinion that the position of defendant is the correct one. Under a similar statute, in reference to the estates of insolvent deceased persons, this court held in *Richardson v. Parker*¹ that it is only the balance remaining in favor of the estate, after all just settlements with debtors, that goes into the fund for distribution. These balances are the "assets," to which the statute refers. In that case a set-off was allowed to the debtor of an insolvent estate in a suit by the administrator against him; and, although it was a case of legal set-off purely, we are of opinion the principle announced applies equally to the case of equitable set-off. The Court has, in fact, shown a disposition to extend the principle to every case. It was so expressly extended to insolvent corporations in *Moseby v. Williamson*,² and to a general assignment by an insolvent bank, in *Comfort v. Patterson*.³ It has also been recognized that the same principle is applicable to the estates of bankrupts under national bankrupt laws,⁴ and the principle has been uniformly so applied by the bankrupt courts.⁵ It is applicable to receivers of corporations, under State statutes.⁶ Also to receivers of insolvent national banks.⁷ And this, too, although the law of set-off is held not to have been enlarged by either the bankrupt or national bank acts. *Sawyer v. Hoag*,⁸ *Platt v. Bently*, *supra*.

In these and numerous like cases the Court proceed upon the idea so well expressed by the New Jersey Court in *Receivers v. Gas-Light Co.*: "The object of the act is to do equal justice to all the creditors, and equality is equity. But equality of what and among whom? Clearly, of the

¹ 2 Swan, 529.² 5 Heisk., 287.³ 2 Lea, 670.⁴ *Richardson v. Parker*, 2 Swan, 530; 5 Heisk., 287; 2 Tenn. Ch., 479, and cases there cited.⁵ *Drake v. Rollo*, 4 N. B. R., 689; *In re City Bank of Savings*, 6 N. B. R., 71; *In re H. Petrie*, 7, N. B. R., 332; 2 Vern. 428, note 1.⁶ *Receivers v. Gas-Light Co.*, 23 N. J. Law, 283; *Miller v. Receiver*, 1 Paige, 444; *McLaren v. Pennington*, 1 Paige, 112.⁷ *Platt v. Bently* (N. Y.), 11 Amer. Law Reg. (N. S.), 171; *Wait. Insolv. Corp.*, § 549.⁸ U. S. Sup. Ct., 1873; 17 Wall., 610.

assets of the bank among the creditors of the bank. In cases of cross-indebtedness, the assets of the bank consist only of the balance of the accounts. That is all the fund which the bank itself would have had to satisfy its creditors in case no receiver had been appointed. And there is no equality and no equity in putting a debtor of the bank, who has a just and legal set-off as against the corporation, in a worse position, and the creditors in a better position, by the failure of the bank and the appointment of receivers."¹ In that case, although the debt to the bank was not due at the time of failure and the appointment of receivers, the defendant was allowed, in a suit brought after maturity, to set it off against a debt due by him to the bank at the date of failure.

These considerations and authorities are equally conclusive against the argument of complainant that the rights of the parties were fixed at the date of the assignment. It is true they were fixed, in the sense that a debtor of the assignor could not thereafter purchase or acquire a debt against the assignor, and set it off against his own debt to the assignor.² Unless the debt was held at the date of assured insolvency, in case of a corporation, or at the date of the assignment of an insolvent debtor, or the death of an insolvent decedent, it cannot be set off.³ If the estate be solvent, the set-off will be allowed, although acquired after the death of plaintiff's intestate.⁴

The second question presented by the agreed case is whether the legal right of set-off existed when the suit was commenced. The indebtedness on both sides being then due and mutual, under the rules herein announced, it would seem that the only question remaining is whether the agreed case is to be treated as, in effect, a suit to recover the deposit. We are of opinion that it must be so treated. We do not so hold simply because the assignee appears as complainant on the record and in the agreed statement. That

¹ McGinnis v. Allen, 2 Swan, 645.

² 5 Heisk., 287; 2 Swan, 529; 9 Heisk., 501, 506; 8 Baxt., 408.

³ 2 Swan, 645.

⁴ 23 N. J. Law, 294, 295.

is a circumstance, it is true; and, the case being a controversy between parties, one or the other must be regarded as the actor or complainant. Looking to the substance of the controversy and relief sought, it is seen that the assignee asserts the right to recover the deposit, in the first instance, or, if not, then to have the Court declare its right to charge up the amount of the deposit to the bank as so much cash paid on its *pro rata*, which is manifestly the same thing, as the statement shows the bank will be entitled to receive more than that amount in any event. On the other hand, the bank is seeking no decree at the hands of the Court, further than to have declared valid its previous act applying the deposit as a payment on the notes, or its right now to have it so applied; either right being sufficient to repel the assignee. We think, therefore, that the case is in effect a suit by the assignee to recover the deposit, commenced on the 4th day of December, 1891, and therefore that the Chancellor's decree, in its result, is supported by the bank's legal, as well as equitable, right of set-off; the original equitable right having ripened into and become a legal one before the suit was commenced.¹ The Chancellor's decree is therefore affirmed, and the assignee, out of the assets in its hands, will pay costs.

SET-OFF IN INSOLVENCY.

It was remarked in a recent case, with reference to the doctrine of set-off, that "Well-defined and easy of comprehension as the doctrine is, however, its application to the varying state of facts which arise is attended with the same degree of difficulty that attends the administration of other plain legal principles, under unusual circumstances." (Per BUTLER, J., in *Yardley v. Clothier*, 49 Fed. Rep., 337.) No

state of facts presents greater difficulty to the application of this doctrine, and none has given rise to greater diversity of opinion amongst juridical writers as to its legal effect than the insolvency of one of the parties. It is not in every case, however, where one of the parties is insolvent, that this result follows, as, in its general features, insolvency presents no obstacle which interferes with the application of

¹ *Keith v. Smith*, 1 Swan, 92; Mill & V. Code, § 3628, subsection 1. Mill & V. Code, § 3628, provides: "The defendant may plead, by way of set-off or cross-action: (1) Mutual demands held by the defendant against the plaintiff at the time of action brought, and matured when offered in sett-off," etc.

this doctrine. Since the earliest bankrupt statute, that of 4 and 5 Anne, Ch. 17, there has been universally contained in that class of laws a provision that where there are mutual debts or mutual credits between the parties, the balance of the accounts shall constitute the true debt and shall be alone recovered.

Prior to the existence of these statutes, however, courts of equity were accustomed to exercise the doctrine of equitable set-off where, owing to the peculiar state of facts, it would have been inequitable to have permitted a creditor to have recovered the full amount of his claim without reference to any cross demand: *Van Wagoner v. Patterson Co.*, 23 N.J. Law, 283, 1 Modern, 215.

Since the enactment of those statutes the courts have been accustomed to apply the doctrine of equitable set-off independently of the statutes, where its non-application would cause a result contrary to the universally accepted ideas of equity.

It is well settled that where a remedy at law is adequate and complete, the fact that it may prove ineffectual by reason of insolvency of the defendant, confers no jurisdiction upon a court of equity.

But in the distribution of the estates of insolvents, there is a disposition upon the part of many of the courts to hold that mere insolvency of a person, without the support of other circumstances, is sufficient to permit a court to exercise its equitable powers of set-off, and, as shown by the principal case, they have gone so far as to permit a debt not due to be set off against one already matured. Upon this point much conflict exists, how-

ever, and the question is not yet free from doubt in those jurisdictions where there has been no express declaration upon the subject.

Three classes of cases have arisen, calling for the application of this doctrine in cases of insolvency:

I. Where at the time of insolvency both the debt due to the insolvent and that due from him had fully matured.

II. Where at the time of the insolvency the indebtedness owing by the insolvent was fully due and payable, but the debt due to him had not matured.

III. Where at the time of insolvency the indebtedness to the insolvent was due and payable, but that owing by him had not matured.

(1) The first of these cases, where both debts are due and payable at the time of insolvency, presents no difficulty. It will be observed that in those States where bankrupt laws are in force, the provision that where mutual debts and mutual credits exist, the balance of accounts shall constitute the true debt, covers this case completely. Where no such statutes exist the courts will, in the exercise of their chancery powers, permit only the balance due to be recovered under these circumstances: *Light v. Leininger*, 8 Pa., 403; *McDonald v. Webster*, 2 Mass., 498.

The debt which it is proposed to set off must, however, be one which was owing to the defendant at the time of insolvency. The acquisition, subsequent to that time, of a claim owing to another person at the time of insolvency gives no right of set-off. *Irons v. Irons*, 5 R. I., 624; *Northampton Bank v. Balliet*, 8 W. & S., 317; *Pass v. McRea*, 36 Miss., 143.

To the general rule, that where

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both debts are payable at the time of insolvency set-off is allowed, there are exceptions which arise out of the peculiar relations prevailing between the parties.

A depositor in an insolvent savings bank, who is also a debtor to the institution for money borrowed from it, is not entitled to offset the amount of his deposit against his indebtedness. These decisions are based upon the ground that the debt owed by the depositor belongs in fact to all the depositors, but neither the bank nor the depositors owe him anything more than his just proportion of the assets owned by the bank: *Hannon v. Williams*, 34 N. J. Law, 255; *Stockton v. Mechanics' Savings Bank*, 5 Stewart Eq. (N. J.), 163; *Osborne v. Byrne*, 43 Conn., 155. The same exception has also been made in the case of members of a mutual insurance company, the courts holding that a member of such company cannot set off any indebtedness of the company to him in a suit against him to recover unpaid assessments: *Hillier v. Allegheny Mut. Ins. Co.*, 3 Pa. St., 70; *Lawrence v. Nelson*, 21 N. Y., 158; *Sawyer v. Hoag*, 17 Wall, 610.

(2) The second class of cases, where the debt from the insolvent is due at the time of insolvency, but the debt to him matures subsequently, is free from difficulty. In the absence of controlling statutory regulations, where at the time of insolvency the proposed set-off was due, it has always been allowed, irrespective of the fact whether the debt to the insolvent had then matured or not: *Jordan v. Sherlock*, 84 Pa., 366; *Skiles v. Houston*, 110 Pa., 254; *Yardley v. Clothier*, 49 Fed. Rep., 377; *Houston v. Nicholson*, 4 Camp., 342; *Van Wagoner v.*

Patterson Co., 23 N. J. L., 283; *Platt v. Bentley*, 11 Am. Law Reg., N. S., 172; *Smith v. Felton*, 43 N. Y., 19; *In re Receiver of Middle District Bank*, 1 Paige, 585; *Miller v. Receiver of Franklin Bank*, 1 Paige, 444; *Hade v. McVey*, 31 Ohio St., 231; *American Bank v. Wall*, 56 Me., 167; *Colt v. Brown*, 12 Gray, 233.

To this rule an exception has been made in the cases of insolvency of national banks. In *Armstrong v. Scott*, 36 Fed. Rep., 63, it was held that in such cases a depositor could not set off his deposit against his indebtedness to the bank, maturing after insolvency, as it was prohibited by Section 5242 of the Revised Statutes, which makes all payment of money by a national bank to its shareholders or creditors, after the completion of its insolvency, or in contemplation thereof, "with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in the payment of its circulating notes," utterly null and void. SAGE, J., said: "The unmistakable force and meaning of the law is to place all creditors upon the same footing of equality. When the plaintiff was appointed receiver, the defendant was in the list of unsecured depositors, to whom payment, the bank being insolvent, was prohibited. The defendant had then no right of set-off, nor any equity against its note, not then matured, which had passed to the receiver." To the same effect is *Stephens v. Schuchman*, 32 Mo. App., 333.

The same question came before the Circuit Court of the United States, Eastern District of Pennsylvania, in *Yardley v. Clothier*, 49

Fed. Rep., 337, and in an opinion by BUTLER, J., in which ACHESON, J., concurred, a conclusion directly opposite to that of *Armstrong v. Scott*, *supra*, was reached. That case was carefully examined, but was not followed, the Court being of opinion that the allowance of set-off would not create any preference among creditors prohibited by Section 5242 of the Revised Statutes. To the same effect is *Platt, Receiver, v. Bentley*, 11 Am. L. Reg., N. S., 171. These decisions seem to be more in accord with the current of authorities than *Armstrong v. Scott*, *supra*.

In this class of cases an attempt has sometimes been made by the debtor of an insolvent estate, whose debt was due at the time of insolvency, to restrain the representative of the insolvent from disposing of a note or other indebtedness held by the insolvent at the time of insolvency, but not then payable.

In *Lindsay v. Jackson*, 2 Paige, 581, in May, 1831, the complainants gave to the defendant two negotiable notes for the sum of \$1,500 each, payable in six months, with interest. About the same time the defendant became indebted to the complainant, on an acceptance of \$4,000, payable on June 13, 1831. A few days before this acceptance became due, the defendants became insolvent. In July, 1831, the complainants filed their bill to restrain the defendants from transferring the notes, and praying that the amount to become due thereon might be set off or applied in part satisfaction of the \$4,000 due on the acceptance. The injunction was granted. Although in this case the debt of the complainants was not due at the time of insolvency, it is doubtful whether it can be

considered as an authority to that extent, as the question was not discussed. The debt to the complainants was due at the time of suit, and it was expressly stated that if the debt to the complainants was not due it could not be set off. No distinction was made between the time of insolvency and the time of suit. That this is the extent of *Lindsay v. Jackson* as an authority is shown by *Smith v. Felton*, 43 N. Y., 19.

In *In re Commercial Bank*, 1 Chan. App., 538, a different conclusion was reached. In that case the debt from the insolvent bank to *Smith, Fleming & Co.* was due at the time of insolvency. The bank held notes of *Smith, Fleming & Co.*, which were not due until some subsequent time. The Court refused to restrain the official liquidator from transferring the notes, although it was acknowledged that if the notes had been held by the official liquidator until maturity, *Smith, Fleming & Co.* could have set off the amount of their deposit against the amount of the note.

(3) The right to set off the debt of an insolvent which matures subsequent to insolvency, against a debt due to him at that time, is involved in so much doubt as to fully warrant the statement in the principal case, that "the cases are in hopeless and irreconcilable conflict on many of the points involved. An effort to reconcile them would be futile."

At law, insolvency has no effect whatever upon the question of set-off; but in equity it has always been recognized as allowing its application, either when connected with other circumstances, or where the claims are due, but the damages are not liquidated. Whether in-

solvency alone, without the presence of other facts conferring jurisdiction upon a court of equity, will warrant the application of the doctrine of equitable set-off, is a question where great diversity of opinion exists.

In the principal case, after a careful consideration of the subject, the Court arrived at the conclusion that insolvency alone is sufficient ground to permit a court to exercise its powers of equitable set-off, and that it would be inequitable and unjust to compel a person occupying the dual position of debtor and creditor of an insolvent estate to pay his indebtedness to the estate in full and receive only a *pro rata* share of his claim against the estate, simply because at the time of insolvency the indebtedness against the insolvent had not matured.

This doctrine has received much support, and is applied in *Aldrich v. Campbell*, 4 Gray, 284; *McDonald v. Webster*, 2 Mass., 498; *Bigelow v. Folger*, 2 Metc., 255; *Bemis v. Smith*, *Ibid.*, 194; *Dennon v. Boylston Bank*, 5 Cush., 194; *Berrigan v. Pearsall*, 46 Conn., 276; *Carter v. Compton*, 79 Ind., 37; *Clark v. Hawkins*, 5 R. I., 219; *Green v. National Security Bank*, 6 W. N. C. (Pa.), 399.

In *Campbell v. Aldrich*, *supra*, THOMAS, J., says: "This case is not to be determined upon the technical rules of set-off, but upon the principles regulating the settlement of insolvent estates, whether of persons living or deceased. The settlements with such estates are final, and all mutual demands are to be balanced. Claims not liquidated and debts, though not absolutely due, though payable in the future, are to be included. The

balance found upon such adjustment is the only debt remaining. In the case of an insolvent estate of one deceased, all claims existing at the time of the death are to be set off; in the case of an insolvent estate of a person living, all claims existing at the time of the first publication of the notice of the issuing of the warrant may likewise be set off." In *Greene v. National Security Bank*, *supra*, ELCOCK, J., said: "If any equity springs from the fact of Stewart's insolvency in favor of the bank, then it can hold, or stop, or defalcate, or set off, or defend to that extent. The relationship between the bank and its depositor or customer is simply that of debtor and creditor, for no ear-mark follows the deposit and the banker uses the same for the general purposes of his business. The bank becomes a creditor of the maker of the notes when it discounts the same, and his debtor when he makes the deposits. The maker's debt is created when he issues his notes; it is true that the time to maturity is his right before payment can be demanded, but the debt exists from the time of issuing the note. The maker has an undoubted right to waive this time and anticipate it by payment. Where a maker becomes insolvent and makes a general assignment for the benefit of his creditors, is it unreasonable to say that he waives further time upon his credit and, expressing his insolvency or inability to pay them at maturity, by such act matures all his debts? He has the power; do not his acts show its exercise? Time on his note is of no further importance to him, and his other creditors have no greater rights than he has granted them."

The opposite view, that insolvency alone does not confer upon the court power to exercise the doctrine of equitable set-off, is held in many cases.

In *Bradley v. Angell*, 3 Comstock, 475, the reason for the position is thus stated: "The proposition is, in effect, to change the contract of the parties in some of its most important provisions, in order to meet a supposed equity arising from matters *ex post facto*."

A similar ground is taken in *Spaulding v. Backus*, 122 Mass., 553; *Appeal of Farmers' and Mechanics' Bank*, 48 Pa., 57; *Bosler v. Bank*, 4 Pa., 32; *Kensington National Bank v. Shoemaker*, 11 W. N. C. (Pa.), 215; *Jeffries v. Agra & Masterman's Bank*, L. R., 2 Eq., 674; *in re Commercial Bank*, L. R., 1 Chan. App., 538; *Lockwood v. Beckwith*, 6 Mich., 168; *Henderson v. McVey*, 32 Ala., 471; *Walker v. Wigginton*, 50 Ala., 579.

As it is said in the principal case, these authorities are irreconcilable. In those States where there is no express declaration upon this question it is impossible to say which doctrine will be adopted.

The rule followed in the principal case seems, however, to be preferable. As an assignor for the benefit of creditors is not a purchaser for value, but a mere volunteer, representing the insolvent and the insolvent estate, it is not clear why a debt against the insolvent, maturing after insolvency, should not be set off in the same manner as one maturing before. The assignment is made for the benefit of all creditors of the insolvent, and it is immaterial, as far as the question of distribution is concerned, whether the debt is due at insolvency or not. If due at the time of distribution it is entitled to participate. There appears to be no ground for making the maturity of the debt at the time of insolvency determine the right to set-off. If allowing a set-off where the debt is not due at insolvency is to make a preference of creditors, it would also appear that such allowance to debts matured at insolvency creates a similar preference.

HORACE L. CHEYNEY.
Philadelphia.

EDITORIAL NOTES.

BY G. W. P.

As the present number of the AMERICAN LAW REGISTER AND REVIEW goes to press, news comes to us of the death of one of our most valued contributors. WILLIAM WHARTON SMITH, ESQ., of the Philadelphia Bar, was drowned at Newport, on July 3d. Those of the "Abstracts of Recent Decisions" in this number which are signed with his initials will have an interest well-nigh sacred in the

eyes of those who knew him, as being the last piece of work wrought by a dearly loved friend whose working days are over.

After taking his bachelor's degree at Harvard, Mr. SMITH entered the Law School of the University of Pennsylvania, from which he was graduated in the spring of 1888. The Sharswood Prize was awarded him for his able graduation essay on "Laws Impairing the Obligation of Contracts." Since that time he has devoted himself assiduously to the study and practice of his profession. He wrote the article on "Joint Executors," in the *American and English Encyclopedia of Law*, and contributed to the AMERICAN LAW REGISTER for December, 1891, a valuable annotation on the case of Hoyt v. Hoyt. For the April number of the current volume of the AMERICAN LAW REGISTER AND REVIEW he wrote the note on "Contributory Negligence," which has received much favorable notice. He had lately been collecting material for a monograph on the same subject, and had set himself the task of preparing, during the present summer, a work on the "Jurisdiction of Orphans' Courts in Pennsylvania as Courts of Equity." Only a few weeks ago he was elected to the honorable position of President of the Law Academy of Philadelphia.

In him the Junior Bar loses one of its most promising members; but it is not only the profession that feels his loss. His death has cast a gloom over an unusually large circle of acquaintances; and it has plunged in a grief too sacred to be expressed in public print that smaller circle of warm friends, who felt for him a love which it is the privilege of few men to inspire.

STARE DECISIS: A NEW METHOD OF AVOIDING THE RULE SUGGESTED.—The rule of *Stare Decisis*, together with the nature of appellate courts generally, has lately received a lengthy exposition by the Supreme Court of Georgia.¹ The necessity for the rule is set forth, half hu-

¹ *Ellison v. Georgia Railroad and Banking Company*, decided October 19, 1891.

morously, in the opinion by Chief-Justice BECKLEY: "Some courts," writes the learned Judge, "live by correcting the errors of others and adhering to their own. On these terms courts of final review hold their existence, or those of them which are strictly and exclusively courts of review, without any original jurisdiction, and with no direct function but to find fault or see that none can be found. With these exalted tribunals, who live only to judge the Judges, the rule of *Stare Decisis* is not only a canon of the public good, but a law of self-preservation. At the peril of their lives they must discover error abroad, and be discreetly blind to its commission at home. Were they as ready to correct themselves as others, they could no longer speak as absolute oracles of legal truth; the reason for their existence would disappear, and then destruction would speedily supervene. Nevertheless, without serious detriment to the public, or peril to themselves, they can and do admit, now and then, with cautious reserve, that they have made a mistake. Their rigid dogma of infallibility allows of this much relaxation in favor of truth, unwittingly forsaken. Indeed, reversion to the truth, in rare instances, is highly necessary to their material well-being. Though it is a temporary degradation from the type of judicial perfection, it has to be endured to keep the type itself respectable. Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to, and repeated indefinitely; but the only treatment of a great and glaring error, affecting the current administration of justice in all the courts of original jurisdiction, is to correct it. When an error is of this magnitude, and moves in so wide an orbit that it competes with truth in the struggle for existence, the maxim for a Supreme Court—supreme in the majesty of duty as well as in the majesty of power—is not *Stare Decisis*, but *fiat justitia ruat cælum*."

The frank way in which the Chief Justice acknowledges that courts of appeal, not only live by correcting the errors of others, but, by "adhering to their own" is refreshing. Yet it may be questioned whether appellate courts are necessarily always placed in the position, when

a wrong principle of law leads to a mistaken decision and a similar case comes before them, of adhering to the error, or lowering their dignity by confessing themselves in the wrong. The true method by which both of these alternatives may in many cases be avoided, is indicated by the way in which courts unconsciously overrule themselves. The Supreme Court of the United States, in the development of the constitutional law has given several examples of this unique method of avoiding a lengthy exposition of the rule of *Stare Decisis*. One example will suffice:

In the case of *Hinson v. Lott*¹ the Court, following the principles adopted in *Woodruff v. Parham*,² decided that a State could tax one who imported liquors from another State, provided an equal tax was imposed upon the manufacture of liquor within the State. The principle of the decision was that the tax, which did not discriminate between the product of a State and other products, was constitutional. Instead of repudiating this principle as applied to liquor in the hands of the importer before the first sale, the Court affirmed their previous decisions in the case of *Machine Company v. Gage*,³ which case presented a similar state of facts, involving the constitutionality of a tax on the importation of sewing machines. At the same time, when the next case, involving a discriminating tax, *Welton v. Missouri*,⁴ came up for decision, instead of treating the tax as void, because discriminating, the Court treated it as a regulation of commerce, void because the national nature of the subject required an uniform rule, and, therefore, the right to regulate was exclusively in Congress.

This last principle was firmly established by repeated decisions. Then the case of *Robbins v. Shelby County Taxing District*⁵ came before the Court. This case involved the constitutionality of a tax on all drummers doing business in the State, as applied to those who sold the products of other States. The law did not discriminate between drummers who were citizens of other States and those of Tennessee. And yet the Court, through Mr. Justice BRADLEY,

¹ 8 Wall, 148.

² 100 U. S., 676.

³ 120 U. S., 489.

⁴ 91 Wall, 123.

⁵ 91 U. S., 275.

was now able to say with an appearance of surprise: "is strongly urged, *as if it were a material point in the case* that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States—that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State."¹

As a result, the case of *Hinson v. Lott*, and its predecessor, *Woodruff v. Parham*, may be considered to be discarded. Yet this has been accomplished without the Court being put to the necessity of lowering their dignity by expressly overruling the decisions in those cases.

Bad decisions, where they are not based on the facts of a particular case, in which instance they are usually unimportant, and can be easily corrected, almost invariably rest on wrong principles of law. It is seldom that a court makes a wrong deduction from the right principle. In the foregoing illustration the rule that the constitutionality of a State tax on interstate commerce depended on the fact of discrimination was unsound. To have expressly abandoned this principle in the case of *Machine Company v. Gage*, which they would have had to do to declare the tax in that case unconstitutional, would have been to lower the dignity and so far impair that "oracular quality" which is essential to the continued usefulness of an appellate court. It may be that the change of ground was unconscious. The consciousness or unconsciousness of the action is immaterial. One thing, however, is proved by the example given: the true method to avoid following a bad decision and yet preserve the dignity of the appellate tribunal, is for the members of the bench to be careful not to base similar cases on the wrong principle; but, at the same time, until new and correct principles have been substituted, to follow the wrong decision when a case involving similar facts comes before them.

W. D. L.

¹ 120 U. S., 497.

NOTE.—Since the publication of the note to *Taylor v. Murphy*, in the June number of the *AMERICAN LAW REGISTER AND REVIEW*, my attention has been called to the case of *Mallory v. Lacrosse Abattoir Co.*, 49 N. W., 1071; S. C. 80 Wis., 170. In this case a mechanics' lien statute, favorable to sub-contractors, was sustained; but Judge CASSODAY delivered an interesting dissenting opinion.

The reference to the Constitution of the United States, on page 402, should rather have been to the 14th than to the 5th Amendment.

B. H. L.

BOOK REVIEWS.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. BY CHARLES FISK BEACH, JR. TWO VOLUMES. Chicago, F. H. Flood & Co., 1891.

The reviewer of a modern legal text-book, with his finger upon the pulse of the profession, would make a faulty prognosis of the effect of the book upon the Bar, if he failed to take into consideration the number of pages which the purchaser will get for his money, and the number of cases which appear in the table of citations. If Beach on Corporations be judged by this standard, it will not be found wanting. In the fifteen hundred pages which these two volumes contain, some ten thousand cases are cited; and the elaborate foot-notes present, in a multitude of instances, carefully selected extracts from the opinions of the courts. But the discussion of leading decisions in the body of the text, which forms such an important feature of Mr. MORAWETZ'S work is wanting in Mr. BEACH'S treatise. Indeed, as a scientific exposition of the law of corporations, the former work is far superior to the latter. The typical paragraph, or section, in Morawetz, is a clear and succinct statement of the principle upon which the point under discussion depends, with illustrations of the application of the principle to the facts of important cases. In Beach, the typical section consists of a collection of sentences, often without logical sequence, each sentence being, in effect, the syllabus of a case cited in the corresponding foot-note.

But the comparison just instituted is not altogether a fair one, for Mr. BEACH, in writing his book, had in view an end radically different from that which Mr. MORAWETZ

sought, and successfully sought, to attain. In the first place, the scope of Mr. BEACH's work is far wider than that of Mr. MORAWETZ. We quote from the preface of the book before us: "In these volumes I have attempted to include all the law of private corporations, whether with or without capital stock, of joint stock companies, and of all the various so-called *quasi* corporations and voluntary unincorporated associations which exist for any private purpose." In the second place, Mr. BEACH has consistently labored to make his work primarily a mine of information from which an answer may be readily unearthed for "the every-day perplexities of the corporation lawyer." He distinctly disclaims any attempt to write a treatise on the law of *Ultra Vires* (a term which, as a distinguished lawyer has remarked in another connection, seems to have become popular with the courts on account of its "convenient obscurity"), or a treatise on stock and stockholders, or on officers and agents. He has striven to furnish the material for answers to such questions as, What can the corporation or its officers lawfully do? How can it lawfully do it? How shall a company be organized to accomplish this or that? and a thousand others which crowd to the pen's point. In other words, his treatise is eminently a *practical* one, and the author would probably be willing to relinquish all claim to distinction for that originality of thought, that nicety of expression and that perfect logic in arrangement which are attainable in a book of smaller scope. In the nature of things, indeed, there is no reason why one work should not combine all these qualities. But granted that the author is a lawyer in active practice, it seems to be, in fact, impossible to effect such a combination. If the wider field is selected by the author, the mass of authorities is so great that exhaustive examination of even the most important of them makes demands upon his time which he cannot meet. And if this is true, where the author devotes all his time to the preparation of a single work, it is doubly true where, as in Mr. BEACH's case, the work is only one of a series—a series which began with his book on "Contributory Negligence" and which will end with his forthcoming

Equity Jurisprudence"—a series of six treatises, to cover the entire field of law as it affects corporations that term in its widest sense. Making due allowance for the clerical assistance which a writer may easily avail himself of, such a project might fairly be deemed preposterous.

In this kind the book is not only a good one, but it is valuable to the practising lawyer. If it does not represent the highest grade of intellectual work, it is, nevertheless, a companion which often proves itself a friend in need. It is a book which every lawyer must have upon his table, and must even keep upon his table or in a rack within reach of his practice brings him even occasionally in contact with corporations. He will sometimes be disappointed, in reaching a particular point, by misleading section headings.

If, for example, he reads Section 77, entitled, "Cases upon which the company may refuse to permit incorporation" (*i. e.*, of the corporate books), he will be surprised to find that the section consists of an enumeration of cases in which a refusal is *not* justified—and not a suggestion of a case in which such a refusal would be justified. But in general the reader will readily find in the statement of the very point of law as to which he is in doubt, with a complete collection of the proper authorities, the date of each decision being given. This is a book to accord such a book; but a very careful examination has convinced us that the praise is deserved. We may, however, differ from the author when he suggests that the work will be useful to law students. It seems to us peculiarly unfitted for the use of students. The authorities which make it so valuable to the working lawyer are those which would serve only to confuse the student.

When most in need of a succinct statement of the law he would be in danger of being overwhelmed by the details of particular cases.

G. W. P.

COMMENTS ON RECENT DECISIONS.

A METHOD BY WHICH THE STATES MAY NOW TAX
INTERSTATE COMMERCE.

The Supreme Court is making rapid progress in its recently assumed task of re-establishing the repudiated right of the States to tax interstate commerce. The doctrine enunciated in *Maine v. Grand Trunk Railway*,¹ to which attention was called in the March number of this periodical, and which was considered as making a radical departure from hitherto well-recognized principles, has been reiterated and carried to still greater lengths in the case of *Ficklen v. The Shelby Taxing District*,² a statement of which will be found among the cases abstracted.

In order to appreciate into what new fields the doctrine above referred to is leading the Court, we need only compare this last case with that of *Robbins v. District*.³ In the *Robbins* case a tax of \$10 a week upon all persons selling goods by sample and not having a licensed house of business within the district was held void as to a citizen of Cincinnati, "drumming" for a Cincinnati firm. In the case at bar the difference was this: The business was of precisely the same character, but the drummers had permanently located within the district, and, for aught that appears in the report, were presumably citizens of Tennessee. The case was also complicated by the fact that the drummers had taken out, and paid \$50 for, a license to do a *general commission business*, and, as one of the conditions of obtaining such a license, they had given bond to report their gross commissions, charges or compensation during the year, and to pay a tax of 2½ per cent. on the same. The Court considered this one of the grounds of their decision, and held that the drummers had voluntarily subjected themselves to the tax. And the Chief-Justice is very careful to say, at the close of the opinion, that "what position they would have occupied had they not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise on this record."

Nevertheless, we believe it follows as a necessary corollary from this decision, that the State may tax in this way the gross receipts of a resident drummer whose business is exclusively interstate. For if it cannot tax those receipts so long as he does no local business, how does it acquire the right to tax them where he extends his activity to business within the State? A State may tax its own internal commerce, but that does not give it any right to tax interstate commerce. For example, in *Selouf v. Mobile*,⁴ where it was held that the State could not require a telegraph company to take out a license before setting up an office within the State, it was urged that a portion of the company's business

¹ 147 U. S., 18.³ 120 U. S., 489.² Not yet reported.⁴ 127 U. S., 640.

was internal to the State, and therefore taxable ; but Mr. Justice BRADLEY said : " But that fact does not remove the difficulty. The tax affects the whole business, without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Consequently, in the case at bar, if the percentage tax had been considered a tax upon interstate commerce, it would have been declared void as far as the interstate business was concerned. The Court was, therefore, under the necessity of holding that it was not a tax upon interstate commerce, and did, in fact, so decide, as witness the following extract from the opinion : " The tax is not on the goods or on the proceeds, nor is it a tax on non-resident merchants ; and if it can be said to affect interstate commerce in any way, it is incidentally and so remotely as not to amount to a regulation of such commerce." The Court finds authority for this proposition in the doctrine before referred to, which first made its appearance in *Home Insurance Co. v. N. Y.*,¹ and was first made use of in interstate commerce questions in the *Grand Trunk* case² above referred to, and which may be stated as follows : " So long as the subject upon which the tax is *in terms* laid on something which the State may tax, such as the property, trade or occupation of the citizen, then the tax will be valid, although the subject which forms the measure of the amount of the tax—in other words, that upon which the tax is graded—is something which the State could not tax directly." This doctrine is, indeed, not new ; but whereas it is now treated as an axiom of constitutional jurisprudence, it was formerly considered in its true light, namely, as a mere subterfuge, an impotent attempt on the part of the State to close the eyes of the Court to the real nature of the tax.

As to the bond which the drummers gave in this case, the correct view would seem to be that of Mr. Justice HARLAN, that it should not be construed as embracing earnings in a business which the State could not constitutionally tax. And it should be remembered that it was only upon condition of giving such a bond that the drummers were allowed to do internal business, and that no one engaging in interstate commerce could do such business without consenting to be taxed for all his interstate business. This would seem to be a clear burden upon interstate commerce, and if the State could not impose such a tax the condition of the bond is void. Says Mr. Justice BLATCHFORD, in *Barrow v. Burnside* :³ " In all cases in which this Court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States."

How far the Supreme Court will carry the novel and, we believe, disastrous doctrine above referred to it is impossible to say, but from present indications it would seem that they are prepared to carry it very far. That its results will be most far-reaching, a very little consideration will

¹ 134 U. S., 594.

² 142 U. S., 117.

³ 121 U. S., 186.

show, for it evinces a disposition on the part of the Court to look solely to the letter of State laws, and to disregard both spirit and practical effect, so that many State tax laws, which have hitherto been declared void, may now, by a few judicious changes in the terms and phrases used, be put into full force and effect, although their practical operation is in no wise altered. Thus has the Court made a fatal breach in that strong bulwark of decisions by which all the efforts of the States to attack interstate commerce have, up to this time, been successfully resisted, and thus it has opened a wide door for the evasion of those wise principles which the former members of the Court laid down for the protection of the commercial interests of the country. There is much food for reflection in the thought suggested by the decisions of the Court for the last year, namely, how great a revolution of doctrine may result from a few changes in *personnel*.

FRANCIS COPE HARTSHORNE.

ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions.

BY

WILLIAM WHARTON SMITH,
HENRY N. SMALTZ,

HORACE L. CHEYNEY,
FRANCIS COPE HARTSHORNE,

JOHN A. MCCARTHY.

BANKING—CERTIFICATE OF DEPOSIT ISSUED BEFORE INCORPORATION.—A bank is not liable, even to an innocent holder, for value, on a certificate of deposit issued before its organization or incorporation, and signed as cashier by the person who afterwards became such, there being nothing to show that the bank ever received any consideration therefor: *Long v. Citizens' Bank*, Supreme Court of Utah, April 1, 1892, BLACKBURN, J. (29 Pacific Reporter, 878).—*J. A. McC.*

CARRIERS OF FREIGHT—DISCRIMINATION—COMMON LAW LIABILITY.—The complainant in this case alleged that the defendant company—a common carrier—charged the complainant 12½ per cent. more than it did other merchants; that said charges were a discrimination against the plaintiff, and though often requested so to do, defendant refused to allow complainant the reduced rates. The facts of this case, for other reasons, not coming within the revised statutes of the State, the question was whether at common law the complainant would have had a right of action. It was held: That while at common law an action would lie for an unreasonable and excessive freight charge, yet there was nothing to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. The fact that one person is charged more than another is only evidence of a discrimination: *Cowden v. Pacific Coast S. S. Co.*, Supreme Court of California, May 6, 1892 (GARVUTTE, J.).—*J. A. McC.*

CARRIERS OF PASSENGERS—UNLAWFUL EJECTION FOR REFUSING TO PAY FARE TWICE—DAMAGES—WHEN NOT EXCESSIVE.—Plaintiff, a passenger on one of defendant's trains, bought a ticket from Brunswick to Atlanta, and took passage on a train running between these points. Between Brunswick and Macon plaintiff gave his ticket to the conductor, and between Macon and Atlanta a new conductor demanded the fare between these latter points. Plaintiff proved to the satisfaction of the conductor that he had already delivered a ticket for the whole distance to a previous conductor. In spite of this the conductor, acting under a rule of the defendant company, threatened to eject him from the train if he did not pay again the fare for the last part of the trip. Plaintiff then paid and sued to recover damages for being compelled to pay twice. Held: That the law of the State was of higher authority than the rule of the company, that the company was liable, and that \$500 damages was not excessive: Supreme Court of Georgia, per Curiam, LUMPKIN, J., dissenting as to the amount of the damages being excessive, February 15, 1892 (14 Southeast. Rep., 708).—*W. W. S.*

CHATTEL MORTGAGES—LIEN—DISCHARGE—REDEMPTION.—The owner of a colt gave a recorded mortgage on it to secure his promissory note. Some time thereafter, a third party, having acquired a lien for keeping the colt, the mortgagees paid the lien and took another note for the amount of the old note, *plus* the lien, and took as security therefor a second mortgage, but did not satisfy the first mortgage. Between the giving of the mortgages the owner sent the colt to one A to be broken with whom it had remained for some time, when the mortgagees took the colt from his possession, against his protest and claim of lien, and sold it at a foreclosure sale under the second mortgage. It was bid in for less than either of the mortgages. Upon an action of trover, brought by A against the mortgagees and vendees, at the foreclosure sale, for the conversion of the horse, it was held: (1) that the mere taking of the second note and mortgage could not operate as an abandonment of the first mortgage, as its lien remained unaffected until discharged by satisfaction; (2) the defendants, by the taking and selling of the colt, are not estopped from setting up the first mortgage against the plaintiff, as the foreclosure did not withdraw the property from the operation of the mortgage: *Austin v. Bailey et al.*, Supreme Court of Vermont, April 21, 1892, per ROWELL, J. (24 Atl. Rep., 245).—*H. N. S.*

CONDITIONAL PAYMENT—ACCEPTANCE OF ORDER.—A being indebted to B for \$30, gave him an order on C for merchandise, not to exceed \$30, to be charged on A's account. The price agreed on for the merchandise was \$32.50, of which B paid \$2.50 in cash. C refused to deliver the goods unless \$30 was paid by B. In an action by B to recover \$32.50 for breach of contract, held: That he could not recover, as the mere acceptance by a creditor of an obligation of a third person, in the absence of proof that the parties agreed that such obligations should be received as payment, cannot be regarded as more than a conditional payment: *Williams v. Costello*, Supreme Court of Alabama, April 27, 1892, per COLEMAN, J. (11 So. Rep., 9).—*H. N. S.*

CONFLICT OF LAW—FEDERAL AND STATE COURTS—MASTER AND SERVANT.—The relation of master and servant, and similar relations, is one solely of State control and regulation, and as in such cases the Federal courts are simply giving effect to State law, it is the duty of the Federal tribunals to follow the decisions of the State courts upon such questions. *Kerlin v. Chicago, P. & St. L. R. R. Co.*, Circuit Court of United States, Northern District of Indiana, April 12, 1892, *BAKER, J.* (50 Fed. Rep., 185).—*H. L. C.*

CONFLICT OF LAWS — PERPETUITIES — BEQUESTS VALID WHERE MADE, BUT VOID WHERE CARRIED OUT.—A testatrix, living in Rhode Island, bequeathed some of her property upon certain trusts, to be maintained and administered in New York. The will was admitted to probate, and the executors accounted in Rhode Island. The trusts were valid in Rhode Island, but void in New York, being contrary to the New York statute against perpetuities. Held: That the courts of New York would enforce the trusts: *Cross et al. v. United States Trust Co. of New York et al.*, Court of Appeals of New York, *O'BRIEN, J.*; *EARL, C. J.*, and *PECKHAM, J.*, dissenting, March 1, 1892 (30 Northeast. Rep., 125).—*W. W. S.*

CONSTITUTIONAL LAW—ACT CONTAINING TWO ITEMS OF APPROPRIATION.—The Act of March 31, 1891, laws of California, entitled "An Act to encourage the cultivation of ramie," etc., provides in Section 1 that \$10,000 be appropriated for the "purpose of encouraging the cultivation of ramie." Section 2 provides an expenditure, either for the purchase of ramie roots for free distribution to farmers, or in the payment of a bounty for merchantable ramie. Section 4 provides for appointment and payment of a State superintendent. Held: That the Act contained two distinct items of appropriation for expressly different special purposes, and was in violation of Constitution, Art. IV, Sec. 34, of California, which provides that "no bill making appropriations of money . . . shall contain more than one item of appropriation, and that for one single and certain purpose to be therein expressed." *Murray v. Colgan*, Supreme Court of California, May 5, 1892, *VANCLIFF, C. J.* (29 Pacific Rep., 871).—*J. A. McC.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—WHERE STATE TAX IS NOT REGULATION OF.—The State of Pennsylvania, having levied a tax upon the gross receipts of all railroads doing business in the State, the State Supreme Court held the tax void as to interstate business, but enforced it as to receipts derived from transportation between two points in Pennsylvania, Mauch Chunk and Philadelphia, by way of Phillipsburg and Trenton, points in New Jersey, the carriage being continuous by the A Co. to Phillipsburg, and by the B Co. from there to Philadelphia, and the tax being confined to the receipts of the A Co., which were derived from transportation wholly within the State. On appeal, held: That the tax was not open to objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk: *Lehigh Valley R. R. Co. v. Pennsylvania*, Chief-Justice *FULLER*, May 2, 1892 (Adv. Sheets, U. S. Rep., Ed. No. 8).—*F. C. H.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—AUTHORITY OF STATE TO AUTHORIZE THE ERECTION OF A BRIDGE OVER A NAVIGABLE RIVER.—In the absence of Federal legislation a State has the power to authorize the erection of a bridge over a navigable stream within its limits, and such power is not confined to cases in which the navigable stream is wholly within the limits of the State, but exists as well as to those streams which extend to points beyond the boundaries of the State: *Rhea v. Newport N. & M. V. R. R. Co.*, Circuit Court of the United States, District of Kentucky, April 7, 1892, JACKSON, J. (50 Fed. Rep., 16).—*H. L. C.*

CONSTITUTIONAL LAW—POLICE POWER—INTOXICATING LIQUORS—RESTRICTING MANUFACTURE, ETC., OF—VESTING IN AN INDIVIDUAL THE RIGHT TO SAY WHO SHALL MAKE, ETC.—An Act of a State Legislature authorized the establishment of an orphans' home, and made it unlawful for any person to make, sell, give, or transmit to any inmate of the home, or any person within three miles thereof, any spirituous or malt liquors, except upon the "written permission of the superintendent of such home." Defendant, at the time the act was passed, manufactured the prohibited articles within the three-mile radius. Held: That the act, which was otherwise constitutional, was not made unconstitutional by vesting in the superintendent of the home the authority to say who should and who should not make, sell, etc., the prohibited articles: *State v. Barringer*, Supreme Court of North Carolina, CLARK, J., March 23, 1892 (14 S. E. Rep., 781).—*W. W. S.*

CONTRACTS—VALIDITY OF WHEN MADE ON SUNDAY—WHAT CONSTITUTES A LABOR OF NECESSITY OR CHARITY.—Plaintiff, a single woman, 80 years old, was taken to a hospital on account of severe injuries, and while there executed, on a certain Sunday, an assignment transferring certain bank-accounts in trust for her benefit and support during life, with remainder to the assignee. A statute of Massachusetts, where the assignment was made, provides that whoever, on Sunday, "does any manner of labor, business, or work, except works of necessity or charity," shall be punished. Plaintiff sought to set aside the assignment upon the ground that it was unlawful under this statute, having been executed on the Lord's day. Held: That the assignment did not come within the statute, and that it would not be set aside: *Donovan v. McCarty*, Supreme Judicial Court of Massachusetts, ALLEN, J., February 25, 1892 (30 N. E. Rep., 221).—*W. W. S.*

CORPORATIONS—SUBSCRIPTION—WAIVER.—By the contract of subscription entered into by the defendant, it was agreed that the corporation should not be organized until \$70,000 had been subscribed. The organization was, however, perfected before the subscription list reached \$40,000. In an action for the unpaid balance of the defendant's subscription, it was held: That he could not avail himself of the defence of the defective organization, inasmuch as he had recognized the validity of the corporation and acquiesced in its expenditures by paying the first two calls on his subscription: *California Southern Hotel Co. v. Collender*, Supreme Court of California, March 28, 1892, VANCLIFF, C. (29 Pacific Rep., 859).—*J. A. McC.*

EVIDENCE—HOMICIDE—RES GESTÆ.—The deceased died from the effects of a wound in the head, inflicted by some sharp instrument, and on the trial of the defendant for murder, the prosecution offered in evidence, as part of the *res gestæ*, the statement of the deceased to a physician that the defendant had done it with a knife, which statement was made about an hour after the wound had been inflicted. Held: Inadmissible: *People v. O'Brien*, Supreme Court of Michigan, May 20, 1892, GRANT, J. (52 N. W. Rep., 84).—*J. A. McC.*

EVIDENCE—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.—Section 1881 of the Code of Civil Procedure provides that a person can not be examined as a witness in the following cases: (1) A husband can not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage, etc. This provision simply effects the competency of a husband or wife as a witness and does not prohibit the production, by the administrator of the wife, of certain letters between husband and wife, where both are dead: *Lloyd v. Pennie*, Circuit Court of the United States, Northern District of California, March 29, 1892, MORROW, J. (50 Fed. Rep., 4).—*H. L. C.*

EVIDENCE—WITNESS—CREDIBILITY.—An instruction that if the testimony of a witness has been given under the influence of ill-will towards a party, and any portion of it is untrue as to any material fact, it may be entirely disregarded, is erroneous in failing to state that it must be knowingly and wilfully untrue, especially where there is nothing to show that the witness was actuated by ill-will, but only that he was not friendly: *Bonnie v. Earll*, Supreme Court of Montana, May 2, 1892, DEWITT, J. (29 Pacific Rep., 882).—*J. A. McC.*

FIXTURES—BETWEEN VENDOR AND VENDER.—The plaintiff sold a portable saw-mill, to be paid for in instalments, the title and right of possession to remain in the plaintiff until the price is paid in full. The purchaser, being permitted by the contract of sale to run the machinery in several townships of a certain county, set it up on a farm in which he had an undivided interest. The boiler was bricked in, the engine set up on brick-work and bolted down to the foundation. Part of the machinery was roofed over. The purchaser afterwards conveyed his interest in the real estate to defendant, who operated the mill as sole owner. It was held: That the machinery remained personal property, and trover was the proper form of action to maintain for its recovery. In order to constitute a fixture there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also: *Lansing Iron and Engine Works v. Walker*, Supreme Court of Michigan, April 22, 1892, McGRATH, J. (51 N. W. Rep., 1061).—*J. A. McC.*

FRAUDULENT CONVEYANCES—CONSIDERATION—KNOWLEDGE OF GRANTEE.—The maker of a note conveyed land to the accommodation endorser, in consideration of the latter's agreement to pay the note and

a mortgage, and the next day made an assignment for the benefit of his creditors. A bill in equity, filed to set aside the conveyance as fraudulent, was dismissed, as the obligations assumed by the grantee fairly represented the value of the ground, and the transaction did not appear to be accompanied with fraud participated in by the grantee: *Ellis v. Herrin et al.*, Court of Chancery of New Jersey, April 20, 1892, per BIRD, V.C. (24 Atl. Rep., 129).—*H. N. S.*

HUSBAND AND WIFE—LIABILITY OF WIFE FOR DEBT OF HUSBAND.—The separate estate of a wife cannot be charged for an account due by her husband, simply because she wrote the creditor as follows: "You will please find enclosed \$50—all I can raise at present. I hope to be able to give you more very soon: Please give credit and oblige, B.": *Bohn's Est. v. Hoffer*, Supreme Court of Colorado, April 25, 1892, REED, J. (29 Pacific Rep., 905).—*J. A. McC.*

HUSBAND AND WIFE—ACTION BROUGHT BY HUSBAND FOR WIFE'S SERVICES—WHEN IT WILL LIE.—Plaintiff kept a restaurant, at which one Kennedy took his meals, at the same time occupying a room in plaintiff's house. Plaintiff's wife helped him in his business and took care of the house, and, in addition to this, nursed Kennedy for some time. Kennedy died, and plaintiff sued his executors to recover compensation for his wife's services as nurse. Held: That a husband's common-law right to recover for his wife's services was not abrogated by the statutes of New York relative to married women, and that the suit would lie: *Porter v. Dunn*, Court of Appeals of New York, GRAY, J.; EARL, C. J., and O'BRIEN, J., dissenting, March 1, 1892 (30 N. E. Rep., 122).—*W. S.*

INSURANCE—TRANSFER OF INTEREST BY ONE MEMBER OF A PARTNERSHIP TO HIS COPARTNER.—The members of a partnership insured certain property of the firm, the policy of insurance containing a provision prohibiting any change "in the title or interest of the insured" without the consent of the insurers. One partner conveyed his interest in the property insured to the other partner without the consent of the insurance company. Held: That the policy was not rendered void thereby: *Virginia Fire and Marine Insurance Co. v. Saunders*, Supreme Court of Appeals of Virginia, LEWIS, P., March 10, 1892 (14 S. E. Rep., 754).—*W. W. S.*

LIBEL—PUBLICATION.—A letter was brought from the post-office by a husband to his wife, in a sealed envelope, addressed to her. She broke the seal and they read it together. In an action for libel brought by the wife against the writer of the letter, held: That she could not recover, as the gist of the action is the injury to the plaintiff's reputation, and the publication of the libel was the plaintiff's own act. In such a case the husband had no legal right to the letter addressed to the plaintiff, as husband and wife are distinct persons, in respect to the publication of a libel: *Wilcox v. Moon*, Supreme Court of Vermont, April 14, 1892, per TAFT, J. (24 Atl. Rep., 244).—*H. N. S.*

LIMITATION OF ACTIONS—INTERSTATE COMMERCE ACT.—The Interstate Commerce Act containing no provision as to the time within which an action shall be brought to recover the amount of freight paid by any person in excess of that paid by any other person for the same service, such actions are to be governed by the State statutes of limitation: *Copp v. Louisville & N. Rwy. Co.*, Circuit Court of the United States, District of Louisiana, April 21, 1892, BILLING, J. (50 Fed. Rep., 164).—*H. L. C.*

MECHANICS' LIENS—PROPERTY SUBJECT TO—POWERS OF CREDITOR.—The property of an oil company was sold by a receiver, under executions obtained upon judgments recovered on mechanics' liens filed against the property, and which particularly described it. A creditor corporation who had received in part satisfaction of its demands against the company two bonds, secured by mortgage upon the property, whose lien was subsequent to the mechanics' liens, appealed from the decree affirming the auditor's report, making distribution of the funds, on the ground that the curtilage designated by the claimants was more than sufficient for the necessary uses of the oil refinery. Held: That an auditor must accept a judgment showing the extent of its lien, as certified to him by the proper custodian of the record: *Sicardi et al. v. Keystone Oil Co. et al.*, Appeal of Imperial Refining Co., Limited, Supreme Court of Pennsylvania, May 9, 1892, per McCOLLUM, J. (24 Atl. Rep., 161).—*H. N. S.*

MUNICIPAL CORPORATIONS—POWER TO TAX—DOES NOT INCLUDE POWER TO EXEMPT FROM TAXATION.—A municipal corporation was authorized by its charter to tax "all the real and personal property" in the town. Held: That under this power to tax it had not the power to exempt property from taxation: *Whiting et al. v. Town of West Point*, Supreme Court of Appeals of Virginia, LEWIS, P.; LACY and RICHARDSON, J. J., dissenting, March 17, 1892 (14 S. E. Rep., 698).—*W. W. S.*

MUNICIPALITIES—NEGLIGENCE—DEFECTIVE STREETS—INJURY TO TRAVELLERS—WHO ARE TRAVELLERS?—A statute of Massachusetts provides that streets shall be kept in repair so that they may be reasonably safe for "travellers." Plaintiff and some companions were playing "tag" on a street, stopped to get breath, and plaintiff then walked away from the rest, when he was injured by coming in contact with an electric wire. Held: That the plaintiff was using the street rightfully when the injury occurred, and that the fact that he had been playing, "tag" a short time previous to the injury did not prevent him from being a "traveller" within the meaning of the statute: *Graham et al. v. City of Boston*, Supreme Judicial Court of Massachusetts, ALLEN, J., February 25, 1892 (30 N. E. Rep., 170).—*W. W. S.*

NEGLIGENCE—CONTRIBUTORY—PROJECTION OF LIMBS FROM THE WINDOW OF MOVING CAR.—The slightest voluntary projection of the limbs of a passenger from the window of a moving car constitutes contributory negligence and will bar a recovery in case of an injury caused partly thereby and partly by the negligence of the railroad company: *Richmond & D. R. R. Co. v. Scott*, Supreme Court of Appeals of Virginia, LACY, J., March 31, 1892 (14 S. E. Rep., 763).—*W. W. S.*

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BELIEF IN THE PRETERNATURAL, AND ITS
EFFECT UPON DISPOSITIONS OF PROPERTY.

I.

CONVEYANCES INTER VIVOS.

BY ARDEMUS STEWART, ESQ.

THE widespread belief in the existence of preternatural beings and influences, and in the possibility of holding intimate communication with and acquiring control over them, is so firmly rooted in the minds of men of all conditions of life and all degrees of education, and affords so easy an opportunity for profitable deception and imposition, that it would not be likely to escape the notice of the law; and, in fact, both criminal and civil courts have been compelled to pass upon its pretensions in various ways and in numerous instances. In criminal law it has been recognized chiefly under the subjects of homicide and false pretences;¹ in civil law it first came into prominence in connection with the subject of defamation. When witchcraft was a capital felony, the accusation of being a witch was

¹ 14 Crim. L. Mag., 1.

no slight imputation; and the old reports and abridgements are full of such cases, although, like many other defamatory words, it seems in time to have lost its original opprobrious meaning to a considerable extent, and to have become a common word of abuse, such as "crank" or "crazy," in our day.¹ With the repeal of the statutes which made it a felony, the slanderous character of the imputation of being a witch or of practising witchcraft almost entirely vanished; but as it is still made an offence in many States to pretend to practice it, there seems to be good reason to hold that if the imputation of being a witch will bear the sense of pretending to be one, it will still be slanderous.²

The powerful nature of the influence which these beliefs, and their promoters through them, exercise upon the minds of those who put their trust in them was early recognized by the Courts of Equity, and the inflexible rule that whenever any transaction between persons in a confidential relation, that gives one of them a preponderating influence over the mind of the other, inures to the advantage of the one who possesses that influence, the law will presume that he exercised it unduly, is now applied as jealously to spiritual advisers as to or to any other confidential advisers, as attorneys or guardians.³ The rule needs no argument to support it. As was well said in *Ross v. Conway*.⁴—"That the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement." The influence he has over those in sound health is but little less powerful. Any dealings,

¹ Rolle's Abr., 44, etc.; Viner's Abr., Vol. 1, 420; *Select Pleas in Manorial Courts* (Vol. 2 of the series of *Ancient Pleas* published by the Seld. Soc.), 143.

² *Wisa v. Lewandouski*, 19 W. N. C., 158 (1886).

³ *Norton v. Relly*, 2 Eden, 286 (1764); *Huguenin v. Basely*, 14 Ves., 273 (1807).

⁴ 28 Pac., 785 (1892).

then, between such an adviser and those who confide in him will be very jealously scrutinized for evidences of presumptive undue influence; and if there be no consideration, or only an inadequate consideration, for conveyances or other transactions between them, they will be presumed to have been procured by undue influence, and to be invalid, unless the grantee can prove affirmatively that there has been no unfair dealing on his part. It is not enough, however, that the grantee in such a case should show that his own conduct has been fair and unobjectionable; he must also show that the conveyance was the free act of the grantor, proceeding from the exercise of his own reason, and not from the persuasion of the grantee, fortified by the confidence which the grantor placed in him; in short, that it was not due to either the conscious or unconscious operation of the grantee's influence.¹ The relation creates the presumption of undue influence, and the burden of proof rests upon the grantee to disprove it.

Gifts by nuns to their convents come under the operation of the general rule, and will be set aside, unless the grantees can disprove undue influence;² but when a professed nun, who has assigned all her property to trustees for the benefit of a Roman Catholic institution, petitions for the transfer of a fund to which she is entitled to those trustees, the Court cannot refuse to make the order requested, merely because the assignment may have been procured by undue influence. "To say that a lady, in the full possession of her faculties, is not to deal with her property because she is under the influence of those who may induce her to deal with it in a way which we should consider unwise, would be attributing to the Courts of England a power which I do not think that they possess."³ This

¹ *Corrigan v. Pironi*, 23 Atl., 355 (1891).

² *Whyte v. Meade*, 2 Ir. Eq. Rep., 420 (1840); *McCarthy v. McCarthy*, 9 Ir. Eq. Rep., 620 (1846); (but see *S. C. Fulham v. McCarthy*, 1 H. L. Cas., 703); *Œuvres d' Aguesseau*, tom. 1, pp. 284, 297 (tom. 2, p. 23, ed. 1761), and tom. 5, p. 514, cited in 2 L. Cas. in Eq., 622.

³ *In re Metcalfe's Trusts*, 2 De G. J. & Sm., 122 (1864).

decision is very severely commented upon in 10 Jur. N. S., pt. 2, p. 91, as follows: "Their (*i.e.*, the Lords Justices') decision is, in one respect, deserving of consideration; it shows how, if it remains unreversed, conventual establishments may, with ease, and apparently without scandal, obtain either for themselves, or for other purposes of the Church of Rome, the entire property of all who, as professed nuns, take the vows of obedience and poverty, the observance of which, at any rate, that Church has so great an interest in enforcing." But these strictures are unreasonable, and a trifle unjust to the judge who delivered the opinion, L. J. KNIGHT BRUCE. The writer wholly overlooks the fact that the application in this case, so far as appeared, was made by the nun herself; and that the rule of undue influence cannot be invoked by third parties to prevent a person from doing with his property what he pleases. No Court has power to interfere with any disposition of his property made by a person of sound mind, unless it be one which the policy of the law does not countenance; and then only on the application of the grantor himself, if he be living. Of course, if he be dead, his heir or personal representative may attack the conveyance, for then they have an interest in it; but while he lives, they have no interest which will entitle them to call it in question. It may be that the writer in the Jurist had running in his head a recollection of the old rule of the civil death of one who had taken monastic vows; but that question was raised in the argument of the case, and dismissed by the Lord Justice as "mere nonsense," which it certainly is at this day, both on principle and authority.¹ The rule is far more dead than it ever made any one who came under its operation, and neither that nor any other rule of law will authorize a Court to interfere with a conveyance to which the grantor continues to assent, no matter if the conveyance and the assent be both procured by undue influence.

¹ *Evans v. Cassidy*, 11 Ir. Eq. Rep., 243 (1847); *Blake v. Blake*, 4 Ir. Ch. Rep., 349 (1853).

While the grantor lives he is the only one injured ; and if he does not complain, no one else has any right to call it in question.

The *prima facie* presumption of undue influence thus created by the law can be rebutted by showing that the conveyance was for an adequate consideration, or was the voluntary act of the grantor, not procured by any objectionable conduct on the part of the grantee, nor due in any degree to the operation of his influence.¹ Even if without consideration, the presumption of invalidity can be thus overcome. In *Kirwan v. Cullen*,² the donor was a woman of full age and competent understanding. The gift was made through an agent, who had no interest therein, to men of high position in the Church, who derived no personal benefit from it, but merely acted as trustees for the purposes of the gift. One of them had, it is true, been the spiritual adviser of the donor in former years ; but she had even then acted in entire independence of him, and that relation between them had ceased two years prior to the execution of the gift. Under such circumstances there was manifestly nothing on which to hang a presumption of undue influence.

The reasons which have led the Courts to put upon the grantees, in such cases, the burden of proving affirmatively that the conveyances are the free and voluntary acts of the grantors, and not procured by the exercise of any undue influence by them, nor due in any degree to the active or passive operation of the influence which they possess over the minds of those who confide in them, apply with greater force to those cases in which the grantee is not merely a spiritual adviser in the usual sense of the term, but imposes upon his dupes by a claim to the possession of preternatural powers or of a preternatural nature that is clearly false ; and if a conveyance to a *bona fide* spiritual adviser is set aside, unless he can show that there has been the utmost good faith on his part, so much the more ought a convey-

¹ *Corrigan v. Pironi, supra.*

² 4 Ir. Ch. Rep., 322 (1854).

ance to be set aside which has been induced by the representations of a man that he is of a supernatural character.¹

Thus far the law is perfectly clear ; but what is the rule with regard to gifts or conveyances for inadequate or no consideration made to those persons who are not spiritual advisers in the usual sense of the term, and whose preternatural claims are not demonstrably false, but may be considered as being still in doubt—of whom the most notable examples are the so-called spiritualistic mediums? The Courts have solved this problem also by declaring, with great unanimity, that the relation of the medium to those who put their confidence in him and the manifestations he produces is analogous to that of a spiritual adviser, and that the same rules of law apply to both. The leading case on this subject is *Lyon v. Home*.² The plaintiff, Mrs. Jane Lyon, a childless widow, past seventy, had been left at her husband's death the absolute owner of a large fortune, a great part of which had been transferred to her by her husband during his lifetime, the whole producing an income of over £5,000 a year. She was very devoted to the memory of her dead husband, and was of a somewhat visionary nature. Having become acquainted with the claims and phenomena of Spiritualism, she called upon Mr. Home, the defendant, who was a so-called medium, and was induced by him to believe that a manifestation of her dead husband was taking place through his instrumentality. The manifestations were by means of rappings, which Home interpreted to mean : "My own beloved Jane, I am Charles, your own beloved husband," etc. Mrs. Lyon was much gratified, and asked the defendant to call upon her at her lodgings, which he did the next day, and a similar performance took place. A few days later he called again, and this time evoked a message to the following effect : "My own darling Jane, I love Daniel (meaning the defendant) ; he is to be our son ; he is my son, therefore yours ;" and also that Mr. Lyon wished Daniel to be independent,

¹ *Nottidge v. Prince*, 2 Giff., 246 (1860).

² 6 L. R. Eq., 655 (1868).

as he was their son, the manner to be indicated at another time.

By means of these and similar manifestations, Mr. Home so wrought upon the mind of the plaintiff that she transferred to him stocks to a considerable amount, made a will in his favor, executed a deed-poll declaring that she had transferred the stocks to the defendant of her own free will and pleasure, and without the influence, control, or interference of the defendant or any other person, and finally executed an assignment and declaration of trust of a sum of £30,000 secured by mortgage, which assignment was in trust to pay the income to the plaintiff for life, and subject thereto, the trustee (who was a friend of the defendant), should stand possessed of and interested in the said £30,000 in trust for Daniel Home Lyon, the defendant (he had previously adopted the name of Lyon by deed-poll, dated December 3, 1866), and declaring that this provision was to be in addition to and not in lieu of the gifts of stock previously made to him.

Thus far all had been plain sailing for Mr. Home, so plain indeed, that he seems never to have thought of being cautious; and this oversight on his part led to his final discomfiture. It would appear that Mrs. Lyon became alarmed at his rapacity, and coolness seems to have sprung up between them about this time. During the next five months the defendant was absent from London several times, and Mrs. Lyon took advantage of these absences to consult the gentlemen, who afterward acted as her legal advisers at the time of bringing suit, and also another spiritual medium, who procured her another alleged message from her husband, in which she was advised that the defendant was an imposter, and that she should go to law to recover her property from him. On the defendant's return to town the plaintiff demanded back the trust deed last mentioned, using violent language against him and his friends; but the defendant refused to surrender it, alleging her language as a pretext.

On the hearing, the defendant testified that the mani-

festations he produced were genuine communications from the spirit world, over which he had no control. Vice-Chancellor GIFFARD, after carefully reviewing the evidence, held that the case was that of one who stands in a position which affords him great influence over the mind of another, and therefore enables him to control the acts of that person to his own benefit; and held, following *Huguenin v. Basely, supra*, and *Dent v. Bennett*,¹ that the onus of supporting the gifts rested wholly on the defendant, the presumption being against their validity; adding, "To this I now add, for the reasons I have given, and having regard to the facts and evidence I have gone through, that in my judgment he has not made or proved such a case as is requisite for their support. There must, therefore, be a declaration in the usual form that the gifts and deeds are fraudulent and void."²

The *London Saturday Review* of May 2, 1868,³ has a long article on this case, which contains much that is suggestive. A few extracts from it may prove both interesting

¹ My. & Cr., 269.

² At the end of his opinion the Vice-Chancellor adds a few words in regard to the legal status of spiritualism in general which are well worth quoting, and from his mouth are certainly entitled to careful consideration. "I know nothing of what is called 'spiritualism' otherwise than from the evidence before me, nor would it be right that I should advert to it, except as portrayed by that evidence. It is not for me to conjecture what may or may not be the effect of a peculiar nervous organization, or how far that effect may be communicated to others, or how far some things may appear to some minds as supernatural realities, which to ordinary minds and senses are not real. But as regards the manifestations and communications referred to in this cause I have to observe, in the first place, that they were brought about by some means or other after, and in consequence of, the defendant's presence, how there is no proof to show; in the next, that the system, as presented by the evidence, is mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish and the superstitious; and, on the other, to assist the projects of the needy and the adventurer; and, lastly, that beyond all doubt there is plain law enough and plain sense enough to forbid and prevent the retention of acquisitions such as these by any 'medium,' whether with or without a strange gift; and that this should be so is of public concern, and, to use the words of Lord Hardwicke, 'of the highest public utility.'"

³ Vol. 25, p. 581.

and useful. After some general remarks, the writer says: "Whichever view is entertained by the Court as to the motives of Mrs. Lyon, on either side there still remains the very serious question to the community whether intimations from the spiritual world are to be recognized by the Court of Chancery. Mr. Home may be a very honest person, and may have only used the supernatural powers which he cannot help exercising. But, taking him at his word, his honesty leads to very odd results. In other words, the spirit world does business in a way which, if it is to be authorized by an English Court, must entail the necessity of a new code, not only of morality, but of law for the everyday world. Mr. Home gets out of a rich, old fanatical widow, who is of such a temper as to be at feud with her own and her husband's relatives, a fortune of very great value. . . . Home's contention is simple. He has done nothing wrong, nothing which the law ought or can interfere with, nothing conflicting with public policy, by receiving under these circumstances £60,000! What he wants the Court to believe is, that no undue influence—and it is utterly immaterial whether it is the influence of Home himself, or of Mr. Lyon, deceased—has been employed; and that the Court is bound not to interfere. This is not only what Mr. Home urges, but what his friends and advisers urge. In the face of this, which is what we are concerned with, it is irrelevant whether Mrs. Lyon was or was not inspired with the same sort of passion which, with its sweet pangs, attracted octogenarian Mrs. Piozzi to Augustus Conway. Nor is it necessary to say whether the spirit revelations are or are not true. However true they may be, our question is, whether we are to allow them to be other than undue influences. The spirits may be very virtuous, pious, pure, disinterested and righteous, and might arrange mundane things better than we do; but their sort of purity and righteousness is quite incompatible with our poor unspiritual society, such as it is. And, therefore, we cannot come to an understanding with the spirits. In other words, we reckon that the Vice-Chancellor

will have to notify to all and singular the spirits and souls of the righteous and unrighteous, to all witches and wizards, ghosts and ghost-seers, goblins and mediums, spirit drawings and airy harps, and to the whole rag-tag and bob-tail of devils and devilkins, that deeds of gift, assignments and wills dictated by the spirits to rich and silly widows, will be summarily set aside as transactions which English law and equity decline to recognize."

It will be noticed that the Vice-Chancellor does not take the ground suggested by the writer just quoted, but rests his decision on higher and more general principles. In so doing he stands on firmer ground; for while the reasoning, more implied than stated by the latter, seems very plausible at first sight, it does not really dispose of the question, but only leads to another. As far as it goes, however, it is very forcible. Granting for the sake of the argument that it is possible for us to hold communication with the spirits of the dead, can such influences as those brought to bear upon the plaintiff in this case be treated by the courts as perfectly proper and worthy to be upheld? "By their fruits ye shall know them." Certainly the only means of testing the propriety of these spiritual influences is by noting their results, and as these are good or bad, classifying the influences accordingly. When this test is applied to the influences now in question, there can hardly be any difference of opinion as to their nature. And if a spiritual influence produces a result, which the justice or the common-sense of mankind would condemn as the result of influence exerted by a human being, why should any special privilege in this respect be granted to a spirit which thus abuses its power over the mind of a mortal, and manifests an unmistakable propensity to use that power for evil? Other considerations aside, such treatment as that suggested would naturally have the tendency to discourage the spirits from exerting their powers in this improper way. Taking it as proved, then, that Mr. Home was, as he claimed, only the mouth-piece of a spirit which actually communicated the alleged messages through him, there would still be

efficient reason for holding that the deeds and gifts were procured by undue influence. But in that view of the case the question might arise and be urged with some force (but ineffectually, as will be shown hereafter), that Mr. Home, being an entirely innocent party, would be entitled to the favorable consideration of a court of equity, and that the exercises of undue influence by the spirit would be no ground for setting aside the deeds made to him. It is clear, therefore, that the position taken by the Vice-Chancellor is the safer and simpler, as it wholly does away with the question of the preternatural, and makes the decision depend entirely on settled principles of law, without invading new, untried and problematic fields of speculation.¹

¹ A writer in the *Law Times*, vol. xlv, p. 5, however, takes exception to this decision, and comments rather severely, and, it would seem, unwarrantably, upon what appear to him to be its logical consequences; This is not the common case of a weak mind enthralled by a strong one—of advantage taken of ignorance. She is not ignorant; she knows too much, or rather, she thinks she knows more than she does know. She verily believes in the spirits, and that the spirits can and do communicate with mortals, through certain mediums, under certain conditions. And this her creed is not more irrational than many creeds professed by whole nations, ancient and modern. Belief in such a doctrine does not in itself prove such weakness of intellect that she is not responsible for her acts, and therefore not to be bound by that which she deliberately does. A voluntary gift is not invalid merely because it is voluntary; it is not to be set aside for lesser cause than would invalidate a bargain and sale. The question is the same in both—was the donor a *free agent*?—meaning by this, a person free in mind as well as in body; did she know what she was doing? did she intend what she did? was she competent to form a fair judgment? It is not whether it was prudent so to do, but whether she did that which her uncontrolled will inclined her to do? If there was coercion over body or mind, her act would be properly set aside; if there was no imposition, it would be avoided; but then comes the question, what is imposition? Can one person be said to impose upon another where both hold a common creed which both, at the time and afterward, sincerely maintained? Could a Roman Catholic priest believing, as he did, in the miraculous powers of a relic, be said to impose upon a Roman Catholic layman who also believed in them, when operating with it for a cure? Mrs. Lyon bestowed her bounty upon Mr. Home because she had faith in spiritualism, and therefore believed that her husband's spirit, rightly invoked, could and would communicate with her. She was not a fool, far from it. She was very shrewd; but she held an irrational creed. That credulity in spiritual matters is not inconsistent with great shrewdness in mundane affairs is testified by the experience of all ages and

A similar case (on the other side of the house) was decided in the Supreme Court of New York in 1883.¹ The defendant, who was a woman of bad character, had been for years practising the profession of a clairvoyant physician, when she met the plaintiff, who, for his part, was a strong believer in spiritualism, believing that the mediums through whom the spirits of the dead communicated with the living were to be treated with the highest regard, and that if they were not obeyed something terrible would befall the person

countries. The question, therefore, comes back to this. Was Mrs. Lyon in the possession of her senses, acting of her own free will, and designing the gift at the time of making it? If so it was, she has no title, because she afterward repented of her generosity, to ask a court of justice to compel the recipient of her bounty to return it. . . . The first impression made by the evidence is that advantage was taken of the plaintiff by the defendant, and the feelings are therefore strongly enlisted against him, and there is a desire that he may be disappointed. But when feeling is put aside, and the strangeness of the spiritualist's creed forgotten, and we look only at the fact, that a woman of more than ordinary sagacity gave to a man whom she believed to possess certain miraculous powers, a large sum of money, from a desire, then sincerely entertained by her, to benefit the object of her admiration, we shall probably come to the conclusion that no sufficient cause has been shown for the interference of the law to undo the act of benevolence now that her feelings toward the object of it have changed, and she repents of her generosity. Such a principle so established would be applicable to cases far beyond the range of spiritualism. It would affect many religious and not a few charitable gifts." But in spite of this direful forecast, there is nothing in this argument which at all weakens the force of the decision. The writer wholly ignores what was the true basis of the decision, that the relation in which the medium stands to his followers is a confidential one, and governed by the same rules as any other confidential relation; and that therefore the burden of proof is upon him to show that he is free from the suspicion which attaches to him by virtue of that relation. He also ignores the uncontrovertible fact of the controlling influence of such beliefs, which does not leave the mind free to act in regard to them, and that the question is not one of general weakness of mind, but of weakness in this particular direction. Nor, as he seems to assume, did the presumption of imposition arise from the acts of Home; it arose from the relation of the parties to each other, and was not a case of actual, but of constructive, fraud. It was this presumption of law, not merely the proved facts of the case, that was the basis of the decision; and with this the whole argument of the writer falls: for his position is very clearly based upon the supposition that this was held to be a case of actual fraud.

¹ *Hides v. Hides*, 65 How. Pr., 17.

disobeying. The defendant at first pretended that she could cure his deafness ; and after a course of treatment, during which she probably became acquainted with his weaknesses, she proposed that they be married. On his saying that he was too old, she told him that the spirits said that they must be married within two weeks ; that if it went over that time something would step in between, and that they, the spirits, would not be responsible for the consequences. She also persuaded him to give her a deed of certain lands, saying that the spirits said that he must give her the deed before they were married. After the marriage, the plaintiff became aware of her true character and brought suit to have the marriage annulled and the deed set aside on the ground of fraud. In her answer the defendant denied that she made the representations alleged by the plaintiff, and inserted the following damaging paragraph : " And upon her information and belief alleges that at all times prior to the time mentioned in the amended complaint at that time and ever since, the spirits, if any, were, and are otherwise occupied than in interfering with or directing mundane transactions concerning either matrimony or real estate."

The referee found for the plaintiff on both questions ; and his report was affirmed by Justice LANDON in a lucid opinion,¹ which, although in great part based upon the ad-

¹ " It appears clearly, by the evidence upon which the referee bases his report, that the plaintiff's consent to the marriage was obtained by fraud. . . . His consent was given under the delusion that the authority which he held in the highest awe and reverence commanded him to give it, and would be gravely offended if he did not. She created that delusion by falsely representing that the spirits gave the command. That his mind was predisposed by the faith of many years to a readiness of belief in the truth of such representations made him, it is true, the more easily a dupe and a victim, but it does not make the grossness of the deception less, nor accord to the impostor any protection. It may be that a person of ordinary prudence would not have been deceived by such representations, but the law does not outlaw from its protection the old, the weak and the infirm. A pretense, says Mr. Bishop (2 Cr. L., Secs. 432, 436), calculated to mislead a weak mind, if practised on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind if practised upon it. Besides, ordinary prudence is a flexible term, and we cannot say that any other person of average capacity would not, under similar circum-

mission of the defendant that her representations were false, serves to refute the argument of the writer in the *Law Times* that Mrs. Lyon could not be said to have been imposed upon by Home, because she believed in the truth of the manifestations produced by him.

So, also, a conveyance of a large part of his property by a man shortly before his death, in consideration of \$1 and friendship, to a woman with whom he had lived for years in adultery and through whom he had obtained alleged messages from his deceased wife, will be set aside on the ground of undue influence;¹ and when an ante-nuptial contract is entered into between a firm believer in spiritualism and a professed medium who possesses much control over him, whereby they mutually agree to marry each other, and the intended husband grants to the woman certain property, but subsequently refuses to fulfil the agreement to marry and does not complete the grant by delivery, the woman cannot recover the value of the property in question by suit after his death.²

The law then, is perfectly clear in regard to all cases where the gifts obtained by such means enure directly to the benefit of the spiritual adviser, the medium or pretender to preternatural power; but there remains the case, which is by no means improbable, of a third person benefited by such impositions. If this third person had hired or in any

stances, have been deceived by such representations, provided his spiritual or religious belief was of the same kind and intensity as the plaintiff's. Our law prescribes no religion, but tolerates all and condemns none, and, therefore, the plaintiff's case suffers no detriment because his religious belief exposed him to the arts of the defendant."

¹ *Leighton v. Orr*, 44 Iowa, 679, 1876.

² *Connor v. Stanley*, 72 Cal., 556 (1887): "It is established that the relation between the parties was confidential, in consequence of her claim to power as a medium, through which she had great control over him. This being established, the burden was cast upon her of showing that there was no undue influence. The rule applies with peculiar force to the relation of one and his priest, confessor, clergyman or spiritual adviser, and certainly with no less force to the relation between one who is a firm believer in, not to say a monomaniac upon, the subject of spiritualism, and the medium in whom he has confidence and upon whom he habitually relies."

way procured the services of the spiritual adviser or medium with a view to profiting by the manifestations and communications of the latter, or even if this were not the immediate aim, but only an incident of the transaction, there could, of course, be no question as to the rights of the parties; for the person who procured the services of the medium would be *particeps criminis*—a party to the fraud—and could have no valid claim to profit by it. This is the rule in the case of a will procured in the manner just mentioned;¹ and the same doctrine with respect to a deed has just been enunciated by the Supreme Court of California :² “Any dealing between them, under such circumstances, will be set aside as contrary to all principles of equity, whether the benefit accrue to the adviser, or to some other recipient who, through such influence, may have been made the beneficiary of the transaction.” Even if the beneficiary was innocent of any share in the transaction, the gift could not be upheld ; for, as was said by Sir W. PAGE WOOD, V. C. :³ “Where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself. Where there has been consideration moving from a third person, and he was ignorant of the fraud, there such third person stands in the ordinary position of a purchaser without notice; but where there has been no consideration moving from himself, a third person, however innocent, can derive no benefit from the transaction. . . . The truth is, that in all cases of this kind, where a fraud has been committed, and a third person is concerned, who was ignorant of the fraud, and from whom no consideration moves, such third person is innocent of the fraud only so long as he does not insist upon deriving any benefit from it; but when once he seeks to derive any benefit from it, he becomes a party to the fraud.”

¹ *Greenwood v. Cline*, 7 Or., 17, 1879.

² In *Ross v. Conway*, 28 Pac., 785, 1892.

³ *Scholefield v. Templer, Johnson*, 155, 1859.

But suppose that all imputation of underhand dealing could be successfully refuted, and that both the medium and the person benefited appeared in the character of innocent parties. In such a case it would be necessary to hold that the influence of the spirits is *per se* undue, or that the pretence of the possession of preternatural power is false and a fraud in itself; or else to hold that the transaction is regular and unexceptionable. This question has not yet arisen; but it is highly probable that when it does, the courts will take their stand squarely upon the ground suggested by the *Saturday Review*, and to which the Vice-Chancellor very strongly inclined, to judge by his words, in *Lyon v. Home*, and pronounce all such alleged manifestations and communications from the spirits of the dead to be a fraud *per se*, and all conveyances and gifts which are procured by such means to be fraudulent and void. As bearing upon this phase of the question, it is a very significant fact that the two mediums consulted by Mrs. Lyon procured for her totally different communications—a fact which certainly tends to strongly discredit them, and would naturally create in a thinking and unbiassed mind a suspicion that all like them were fraudulent. If then, a case should arise in which the question of undue influence could not be successfully pressed, there would still remain the question of fraud; and it would seem to be consonant with common-sense and the general experience of mankind to hold that all such professions are fraudulent, and that, therefore, all gifts procured by means of them are fraudulent and void, even though the person benefited had no share in procuring them. It is certainly a strong argument in support of this view that there is no reported case in criminal law in which similar pretensions have been held to be otherwise than a fraud and a false pretence.¹

It may be regarded as settled, then, that any gift or voluntary conveyance, which is the result of alleged spiritual manifestations or communications, and enures to the benefit

¹ *Crim. L. Mag.*, 1.

of the medium who procures the manifestations or communications, or to the benefit of a third person who has hired or otherwise secured the services of the medium to bring about these manifestations or communications, whether with the object of profiting by them or not, is to be considered in equity as procured by the exertion of undue influence, arising out of the relation in which the medium stands to the person who is induced by his belief in these manifestations to execute the conveyance; that even where the person benefited is free from any participation in the transaction, he is, nevertheless, to be considered as a party to the fraud if he seeks to secure any benefit from it; and it is urged that even if the presumption of undue influence could be successfully refuted, it would still be based upon sound principle to hold that the professions of the mediums were *per se* a fraud, and that no conveyance which was due to them could be upheld. If, however, there is nothing to show that the peculiar belief of the grantor influenced him in making the conveyance, no mere absurd preternatural belief will, of itself, be sufficient evidence of mental incapacity to set it aside. "Many persons believe in spiritual manifestations, insist that they have communications and conversations with deceased friends and the like; yet such things are not necessarily evidence of such a disordered mental condition as to show that those who hold such opinions are unfit to make a disposition of their property."¹

PHILADELPHIA, PA.

¹ *Lewis v. Arbuckle*, 52 N. W. (Iowa), 237.

THE RULE IN MORICE *v.* THE BISHOP OF DURHAM.

BY R. C. MCMURTRIE, Esq.

Professor J. B. AMES, in a paper on the subject of the Tilden Will Case,¹ calls in question the rule known as that of Morice *v.* The Bishop of Durham.²

Certainly it will be a thing to be remarked if this criticism is well taken : if either on the broadest principles upon which any system of jurisprudence can be founded or upon the most narrow of technical rules the rule of that case can be varied.

The rule is this. A devise in trust for objects entirely uncertain, so that no one can possibly insist on the application of the fund, is void. An exception to this rule is to be noted when the objects are charities. The *reason* for the rule, it will be observed, has not been alluded to.

Now it is to be noticed that the case was heard and decided by two of the most competent lawyers England ever produced, Sir WILLIAM GRANT and Lord ELDON. It is also a fact most worthy to be noted for the present purpose that the rule was admitted to exist by all the counsel of all the parties.

A few words on the exception. The existence of the exception in case of charities is not disputed in the English law nor in America—even where that exception is declared not to be in force ; for invariably the refusal to be governed by the exception is based on the assumption that it owed its existence to the statute of 43 Eliz. This view—that the validity of a gift for a mere charitable use without a defined purpose or object is dependent on that statute and was, in fact, created by it—is (as Mr. BINNEY said in his argument in *Vidal v. Girard*) a misstatement of matter of *fact*, not of law or reason ; and it might as well and with

¹ Harvard Law Rev., Vol. 5, No. 8, p 389.

² 9 Vesey, 399 ; 10 Vesey, 521.

as much truth be said that trusts for accumulation were never restricted till the Thelluson Act.

The rule that makes charities an exception, whatever be its origin, is no more than this : any charitable intention, whether described or undefined, is a *person* capable of taking by deed or will, and always was so by the law of England. The origin of the rule is a matter of speculative law. It is attributed by Mr. BINNEY in his argument to the teaching of St. PAUL that had found its way from the servant's hall to the palace. And there is a passage strikingly conformatory of this suggestion in DE CHAMPIGNY'S "Les Antonins."¹ It may be that the doctrine of the Roman law respecting *things dedicated* had some effect in producing the rule that a gift for a charitable purpose is as completely valid as a gift to a living person for his own use. Whatever its origin, it is quite certain as a matter of fact, not as matter of opinion, that this rule has been the common law of England from all time. That is, it has been a rule of property having no dependence on any statute or any prerogative, but is, on principle, identical with the rule that recognizes the right of any beneficiary, whether by deed or will, whether by direct gift or by the intervention of a trustee.

It is obvious that this rule has nothing to do with that which must govern when there is a trust declared but no object named or described. Probably no one will dispute that such a trust is void in the sense that it enures to the benefit of the person creating it if the property has effectually passed from him. In case of a will, it is void precisely as a devise in trust for a named person is a nullity if that person is not living at the time the will becomes operative. The debatable point is then reduced to the case of a clear trust—that is, a disposition which by its terms excludes all beneficial interest in the grantee or devisee, and yet fails to describe the purpose in such a manner as to enable a Court to enforce it.

¹ Vol. i, pp. 262-4.

There are two distinct classes of trusts of this character. Professor AMES combines them as if they constituted but one, and thus finds a ground for his doubt as to the rule itself. The first class is that in which the objects are absolutely uncertain, and can only be made certain by the choice of another. *Morice v. Bishop of Durham* was of this kind. *Any object of benevolence* was within the terms of the trust. The effect of the rule recognized in this case—*recognized*, I say, not *decided*; not *argued*; but assumed and conceded—is that when the discretion of some one is essential to create a beneficial right, and the trustee is precluded from exercising it for his own benefit, the devise is void unless the object is charitable. No one could possibly doubt that a resulting trust would arise had this been a deed; and the reason seems to be quite clear. The beneficial interest is the real one—the trustee is but a medium; the effect of naming a trustee is to exclude any such interest vesting in or being acquired by him. It is clear that if the authority to name the beneficiaries were valid, the beneficial estate and the actual ownership would vest in the heir till the power was exercised. The result would be that, at least during the life of the trustee, the heir might be the owner and subject to all the duties of owner, but liable at the will of the trustee to be deprived of the property, possibly made liable to account, and practically incapable of exercising any incident of ownership. Such a rule of property would be utterly fantastic and absurd. It may well be that the same rule which compels all estates within a limited period to become one of the two inheritable estates, estates tail or in fee simple, or the rule that forbids the grant of a right of way in gross, is another expression of the reason for making such devises void. Certain it is, however, that such dispositions have always been held to be void. “Void for uncertainty” is the rule, or reason applied to extinguish them.

The other class of cases (which is treated as belonging to the same category as those above discussed), are those in which the object or purpose is definite, but there is no

person to be benefited—as, for instance, to erect a monument, to provide for a favorite animal, etc. It is supposed that because there is no beneficiary to enforce the trust they are within the rule. Is not this mistaking the meaning of the language that was used by Sir WILLIAM GRANT, or, at least, misapplying it? There must be (he said) *somebody* in whose favor the Court can decree performance. Did he mean there must be a personal beneficiary who can litigate? This would vitiate the most reasonable of testamentary provisions—such as those for the expenses of interment, or the placing of a stone to mark the spot. Sir WILLIAM GRANT was referring to the quality of uncertainty only, and he included within that all cases which could only be made certain by a selection of objects at the option of the devisee, and where no selection could be compelled. It would be most unfair to attribute an intention to vitiate trusts for specific objects, if perchance there was no machinery of law that could compel the execution. But there is no want of such machinery. The residuary legatee or the next of kin are entitled to the unexpended fund and can thus enforce the trust.

The rule itself, however, is of great importance and value; it applies only where there is a gift to persons or objects that cannot be ascertained at the time at which the grant, whether by deed or bill, must take effect to deprive the grantor or his heir of all beneficial interest in the property.

PHILADELPHIA, PA.

ILLINOIS APPELLATE COURT, FIRST DISTRICT.

CHICAGO AND WESTERN INDIANA R. CO. v. COGGSWELL.

Eminent Domain—Change in Plan of Construction, after Assessment of Damages—Damages to Property not taken—Surface Road changed to Elevated Road.

SYLLABUS.

Change of plan of the public work contemplated, after assessment of damages, inflicting new damages not embraced in the former assessment, will entitle the owner to additional compensation therefor.

But where there was no restriction in the original assessment as to the plan of the work, the doctrine of *res judicata* will apply, and all damages caused by the improvement proposed will be held embraced in the original assessment.

But a change of grade of a proposed railway after assessment from a surface road to an elevated road, is such a change as would not be embraced in the former assessment; and is ground for further proceedings.

Damages cannot be recovered by the owner of property by reason of what is done upon adjacent property, unless the same results in a physical injury to the property of claimant.

The measure of damages to property not taken for injuries done by public works is determined by comparing its value before and after the work is done which causes the injury.

The facts are sufficiently stated in the opinion of the Court.

OPINION OF THE COURT.

WATERMAN, P. J.—In 1880, appellee was the owner of a ten-acre tract of land in the town of Cicero, Cook County, Illinois, which was bounded on the north by Madison street, on the south by the centre line of Jackson Street, extended, and on the west by what would have been the centre line of West Forty-sixth Street if West Forty-sixth Street had been extended south of Madison Street.

Appellee's land which, including streets, was 333 feet east and west, by 1,320 feet north and south. Appellant being a railroad company, had, under an ordinance of the town of Cicero, granting it the right to do so, constructed and was operating a surface railroad, which ran north and south, immediately west of and adjoining the west line of appellee's land.

While thus operating said railroad and while under the ordinances of the town of Cicero, said railroad was permitted to cross Madison Street—"keeping and maintaining all street crossings in good condition and so that the same might be easily crossed in all directions" "without danger to person or property;" the railroad company condemned the west thirty-three feet (or one acre) of appellee's land, for the purpose of its right of way, thus making its right of way sixty-six feet wide. At the time of the trial of the condemnation case in 1884, a jury was waived, and the judge viewed the premises; the surface road was there and in operation at that time; the finding awarded the value of one acre, and declared the remaining nine acres would not be damaged; judgment was entered on the finding, the money was paid, and the appellant went into possession. In 1885 the appellant procured a new ordinance granting it the right to erect a viaduct over Madison Street and to construct its approach thereto from the south, and in 1885 it so constructed said viaduct and approach; that the structure was about eighteen feet high at Madison Street and about eight feet high at the south line of appellee's land. Appellee claims there was no authority of law at the time of the condemnation proceeding to consider the damages to the remainder by reason of an elevated structure, and that this is such a change of plans as authorizes, under the law, the recovery of such additional damages as the evidence shows was caused by such change.

The questions presented in this record, briefly stated, are: Where in condemnation proceeding instituted by a railroad, the damage to property not taken has once been judicially ascertained, and thereafter the grade of the road opposite such property is raised from eight to seventeen feet and thereby the value of the property is lessened; is the owner of such property entitled to additional compensation?

That a recovery may be had for damages caused by a change in the plan of construction with respect to which damages were originally assessed, is established both upon principle and authority.

The reason is obvious. The property owner is entitled, in the absence of anything showing how the road is to be constructed or used, to such damages as it is reasonably probable will ensue from the construction and operation of the road : *C. B. & N. R. R. Co. v. Bowman*.¹ If the road desires to stipulate for any particular mode of construction or operation, and have an assessment of damages limited to such mode, it has a right to do so.²

Manifestly, then, damages having been assessed upon the basis of a certain plan of construction, if a change is made to another mode, the property owner is entitled to such additional damages, if any, as arise from a manner of construction, concerning which there has been no assessment or payment of damages.³

It follows, therefore, that damages done to land, not taken, having once been assessed, when additional damages are claimed upon the allegation that the assessment which has been had was upon the basis of a special mode of construction or operation which has since been departed from ; the first question for determination is with reference to what special kind of construction or operation were the damages in the first litigation had ? In other words, what are the sources from which the damages once awarded sprang ?

If in the former proceeding there was no restriction whatever ; if damages were then assessed for everything which it was reasonably probable would ensue from the taking and use of certain land for railroad purposes, then there can be no additional damages from the use for the same purpose of the same land.

It does not appear that in the former proceeding any particular mode of construction was stipulated for, or that

¹ 122 Ill., 595.

² *C. & A. R. R. Co. v. J. L. & A. Ky. Co.*, 105 Ill., 388 ; *Jacksonville & Savanna R. R. Co. v. Kidder*, 21 Ill., 131 ; *Hayes v. Ottawa, Oswego & Fox River Valley R. R. Co.*, 54 Ill., 373.

³ *Wabash, St. Louis & Pacific Ry. v. McDougall*, 118 Ill., 229-238 ; *Same v. Same*, 126 Ill., 111-120 ; *C. & A. R. R. Co. v. J. L. & A. Ry. Co.*, 105 Ill., 388 ; *Peoria & Rock Island Ry. Co. v. Birk, etc.*, 62 Ill., 332.

any special plan was submitted ; but it is shown that the judge before whom the cause was tried, a jury having been waived, inspected the premises and saw that the road was then constructed and passed the premises now under consideration at about the natural surface of the ground.

Were, then, the damages proceeding in the former assessed with a view to the existence of a surface road only ?

In *St. Louis, Jacksonville and Chicago Railway Co. v. Mitchell*, 47 Ill., 165, it was held in a proceeding to obtain the right of way across certain lands, that for the purpose of reducing the damages, evidence should have been admitted to show that the company had contracted for the building of a fence through the land, and had provided the lumber therefor. It would seem from this that if the jury had visited the premises and found a fence already constructed by the company, they would have been bound to take such fact into consideration in arriving at their verdict.

In *Carpenter v. Eastern & Amboy R. R. Co.*,¹ it appeared that the commissioners to assess damages from the taking and use of a right of way for a railroad, proposed to be located through a farm, were informed by agents of the company that the road would pass over the farm by an iron bridge supported by abutments, and assessed damages, and a settlement was made upon that understanding. The road having changed its intention and concluded to cross the farm by a "fill," the Court upon this state of facts held that the owner was entitled to recover such increased compensation as was equal to the increased damage.

In *Boyd v. Negley*,² it is said that when a petitioner adopts a grade before the damages are assessed, and marks the grade upon grade-pins along the route, these having been seen by the jury, it must be presumed to have assessed such damages as would be caused by the construction of a road with the grade marked and

¹ 24 N. J. Eq.

² 53 Penn. State, 387.

with the filling or embankments indicated. It is questionable whether, in view of the proximity of Madison Street, which the road crossed; appellant had at the time of the former proceedings any such authority from the town of Cicero, in which these lands were, as would have enabled it to have passed the premises of appellee upon any grade save one nearly that of the natural surface. The ordinance authorizing the construction of a viaduct seems to have been passed September 26, 1885; the judgment in the former proceeding was entered May 31, 1884. We are, for these reasons, of the opinion that damages must be presumed to have been in the former proceeding assessed upon the basis of a road passing the premises of appellee at about the natural surface grade. The change of construction that has been made since the former proceeding, is that the road passing and near to the premises of appellee, has been raised, an embankment having been constructed, varying in height from eight to seventeen feet; this embankment has been constructed and the road runs upon land which the company own in fee.

What are elements that may be considered in ascertaining the sum, if any, which appellant is entitled to recover because of the building of this embankment and the running of trains thereon?

Any real property may be damaged or benefited by what is done upon property adjacent to it or in the vicinity.

As the owner cannot be called upon to pay private individuals or corporations for the benefit which may come to his property from the construction by them of manufactories or fine dwellings in the vicinity of his premises; so there are certain depreciations in the value of his lands for which, arising as they may, from things which every owner of property had a right to do, he cannot claim compensation.

If an unsightly structure be erected, or suffered to remain in a beautiful residence neighborhood, its tendency is to depreciate the value of surrounding property, but it is not a damage for which a recovery can be had.

So, too, a beautiful view, the prospect which one has

from his windows, adds to the value of his home, and positive damage is done when his neighbor, by the rearing of a lofty structure, shuts out all sight of the pleasant landscape; but the law affords for such damage no redress.

The maxim, "*Sic utere tuo ut alienum non laedas*," in its practical application, means only that one in the use of his own property must not infringe upon the lawful rights of others.

Had the strip of land to the west of appellee's premises, upon which this railroad runs, been owned by a private citizen, he might have built thereon an embankment or a wall seventeen or forty feet high, without rendering himself liable to appellee for the loss of view he had thus caused, or the difficulties he had thrown in the way of the opening of streets running through and west of the premises of appellee. So, too, such private owner, in an uninhabited neighborhood, such as this was, might have built upon his premises a saw-mill, an ice-house, cattle-sheds or other structures undesirable in a fine residence neighborhood, but whose erection would have been a lawful use and one of which the appellee could not have successfully complained in a court of justice.

Buildings and works of this class might have been entirely inconsistent with the use to which appellee designed to put his property. They might have rendered his property less or more valuable than it otherwise would have been, might practically have put money in or taken it from his pocket, yet he would not in either case have been called upon to pay or been entitled to receive compensation.

We understand that the Constitution and laws of this State, so far as compensation is concerned, place the taking and use of property for public purposes in the condition that exists with respect to private use. The owner of property taken or held for public purposes, if he devote his property to any use which would be a nuisance, or would be actionable if done by a private citizen, may be made to pay just compensation for the damage done to the property of others by such use; but the liability of the owner of property de-

voted to public uses is no greater than is that of the owner of property held for private purposes; the right of one to use without being liable for damage is the equal of the other.

In *Rigney v. the City of Chicago*,¹ the Court says: "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station or the like will generally cause adirect depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*."

And further, in the same case, the Court said: "In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."

To the same effect are the cases of *City of Chicago v. Union Building Association*,² *City of Olney v. Wharf*,³ *Hall v. Mayor of Bristol*,⁴ *Chamberland v. West End Ry. Co.*⁵

The erection of an embankment upon the premises of appellee, no right of access or approach having been disturbed, did not, nor does the mere running of cars thereon constitute a physical disturbance of any of appellee's rights.

The Court ought not therefore to have permitted evidence of damage because of the erection of an embankment, to have been given to the jury. So far as appears, appellee never had any rights touching the construction of an embankment upon the premises of appellant, or to have his, appellee's, land left so that streets could be cut across it

¹ 102 Ill., 64-80.

² 102 Ill., 379-394.

³ 115 Ill., 519.

⁴ 2 Law Repts. C. P. C., 322.

⁵ 10 E. C. L., 704.

without going under a railroad track, or to have the strip of land lying west of his grounds occupied by undesirable structures, or such as would depreciate the value of his property.

Appellee, we presume, did have the right that dust, smoke and cinders should not be thrown upon his premises; such action upon the part either of a private individual or the public, it is quite likely, would have been a direct physical disturbance of a right which appellee had in connection with his property; for such disturbance upon the part of an individual, the law has always afforded a remedy; and in this State since the adoption of our present Constitution, providing that private property shall not be damaged for public use without just compensation, a remedy is given to the owner for such interference, whether by or for the public, or by private individuals.

Our attention has been called to the language of the Supreme Court, repeatedly used, that in cases arising under the provisions of the Constitution relative to the damaging of property for public use, "the depreciation is determined by comparing its value before and after the structure is made which produces the injury."

As applied to the facts of the cases in which such language was used, it was correct and applicable. Such language has not, however, so far as we are aware, been used in a case like the present, or in any instance where an attempt had been made to recover damages for the doing for public purposes of that for which, if done for private uses, no action would have lain.

In the former proceeding damages were awarded to the owner of these premises for the taking of a strip of land, thirty-three feet wide, adjacent to and west of the land now under consideration, and an adjudication was also had as to the damage which, as the owner of these premises, it was reasonably probable he would sustain from such taking and from the construction and operation of a railroad as then proposed and indicated; that included such throwing of smoke, cinders and dust upon these premises as it was

reasonably probable would ensue from a railroad running at about the natural surface of the ground. If the subsequent elevation of the track causes any more than this quantity of cinders, etc., to be cast upon the premises of appellee, and thereby he suffers an additional damage, he is entitled to recover therefor.

In saying what we have as to the throwing of dust, cinders, etc., upon the premises of appellee, we do not wish to be understood as prejudging the case at bar. Upon another trial, as in all cases of this kind, the right to recover for interference with an alleged right appurtenant to property must necessarily depend upon the existence of the rights asserted. In this respect the rights as to property vary with the situation, surroundings, etc. If a person erect a dwelling-house in the immediate vicinity of a blast furnace and rolling-mill, it would hardly be contended that, having seen fit to go and make his home in such a neighborhood, he would be entitled to enjoin the proprietors of the furnace from filling the air with smoke or from disturbing the serenity of his repose by the loud and jarring noise the carrying on of their works necessarily involved.

Every person has a right to the reasonable enjoyment of his property. What is a reasonable use of one's property must necessarily depend upon the circumstances of each case; for a use for a particular purpose and in a particular way, in one locality, might be lawful, and a nuisance in another¹

It is urged that the conclusion arrived at in the former proceeding that these lands would not be damaged by the construction of this road running at about the natural surface grade, must have been upon the theory that the benefit derived from the opportunity thus afforded for switch connection from manufactories and coal yards that might be located on these lands, equaled any damage incident to its construction and operation. Appellee insists that there is

¹ *Barnes v. Hawthorn*, 54 Me., 124; *Wier's Appeal*, 74 Penn St., 230; *Bamford v. Tumley*, 3 B. & S., 62; *Tipping v. St. Helen's Smelting Co.*, 4 B. & S., 608.

no opportunity for switch connection from his premises with the road as now constructed, and that consequently his lands do not now have a benefit considered in the former proceeding.

Upon what theory the Court came to the conclusion arrived at in the former proceeding, we cannot know.

By the former judgment it was established that these lands were not damaged by the road as it then existed.

By the change of grade which has since been made, the right to have switch connections has not been taken away. No switch connections have been destroyed; the property was then and is now vacant and occupied.

All that had been done in this regard is that the present grade may require that the manufactories, etc., hereafter located on these premises, shall, in order to have useful switch connections, be constructed with reference to the present situation; such construction may be more expensive and may be more or less advantageous than one adapted to switch connection with a road running at a natural surface grade.

It is not difficult to see that there may be advantages or disadvantages in having a railroad pass one's premises upon a viaduct seventeen feet high rather than upon the surface of the ground.

All these things may be properly taken into consideration in the case, it being borne in mind that a recovery can be had only for such damages, if any, as are in addition to any that arose from the road when running at about the natural surface; and that damages can only be awarded for a direct physical disturbance of a right which the property owner has in respect to his property, a right which exists in respect to the use for private as well as public purposes of other property.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

ADDITIONAL DAMAGES FOR CHANGE OF PLAN.

In many ways the first three propositions laid down in the opinion and noted in the head-notes, relating to additional damages by change of the plan of the proposed improvement, serve to point out the incompleteness of the statutory requirements and conditions imposed upon parties seeking to exercise the power of the government to take property for public use. A short remedy is to require that the party seeking to exercise this power file a plat with plans and specifications of the improvement, notify the world thereof, and then be held to that plan. In Illinois this result has been reached by a series of decisions: *Jacksonville, etc.*, R. Co. v. *Kidder*, 21 Ill., 131; *St. Louis, etc.*, R. Co. v. *Mitchell*, 47 Ill., 165; *Peoria, etc.*, R. Co. v. *Birkett*, 62 Ill., 332; *Peoria, etc.*, R. Co. v. *P. & Farmington R. Co.*, 105 Ill., 110; *Chicago & N. W. R. Co. v. Chicago & Evanston R. Co.*, 112 Ill., 589; *Ill. & St. L. R. & Coal Co. v. Switzer*, 117 Ill., 399; *Wabash, St. L. & P. R. Co. v. McDougal*, 118 Ill., 229; *S. C.*, 126 Ill., 111.

And in these cases it is held that the party exercising the power and filing the plan cannot afterwards substantially deviate from the plan on the basis of which the compensation was estimated without being liable for any damage which results from such change.

This has long been the rule both by statute and judicial construction in cases of municipal improvements by special assessment, and should be so, and frequently is, in the kindred condemnation cases.

For rule in special assessment cases, see, *Kneeland v. Furlong*, 20 Wis., 437; *Houghton v. Burnham*,

22 Wis., 301; *City of Springfield v. Mathers*, 124 Ill., 88; *Pearce v. Hyde Park*, 126 Ill., 287; 1 *Starr & Curtis, Ill. Statutes C. 24*, ¶ 135.

For similar rule in condemnation proceedings, see, *Lancaster v. Kennebec Log, etc., Co.*, 62 Me., 272; *In re N. Y. & Boston R. Co.*, 62 Barb., 85; *Indianapolis, etc., R. Co. v. Reed*, 52 Ind., 357; *Convers v. G. R. & I. R. Co.*, 18 Mich., 459; *Warren v. Spencer Water Co.*, 143 Mass., 9; *Kenein v. Arlington*, 144 Mass., 456; *Woodbury v. Marblehead Water Co.*, 145 Mass., 509; *Hamor v. Bar Harbor Water Co.*, 78 Me., 127; *In re Boston re R. Co.*, 10 Abb. N. C., 104; *N. Y. & A. R. Co. v. N. Y., & C. R. Co.*, 11 Abb. N. C., 386.

The requirement of the law as to description of improvement cannot be disregarded: *Riddle v. Animas, etc., R. Co.*, 5 Col., 230; *Heck v. School District*, 49 Mich., 551; *Darlington v. U. S.*, 82 Pa. St., 382; *Williams v. Hartford, etc., R. Co.*, 13 Conn., 397.

Proceedings for one work cannot be made to cover a new and different work. Damages assessed on one basis cannot be made to embrace injuries inflicted by work on another and different basis.

Where there was no restriction of plan in the original work the damages must be held to have been assessed for any work coming within the terms of the work as proposed.

A fundamental change in the character of work, such as in the fair interpretation of language would not be embraced in the description of the work proposed, may be the basis of a fresh assessment of damages even where no restriction of plan existed in the original.

Concerning this last rule, we may suggest that the party seeking to condemn property files a petition describing the proposed work. This description is part of a pleading and should be construed like other pleadings, most strongly against the pleader: 1 Chitty Pleading, 261 and cases cited.

It may be objected that this rule applies during the continuance of the suit, and that after judgment, under the rule of *res judicata*, they should be construed broadly to embrace everything involved in the issue.

There are two answers to this. First, the latter rule applies to the *judgment* itself, but not to the pleadings on which it is based.

Secondly, the judgment in condemnation proceedings operates not only as a satisfaction of past injuries but as a license for future acts, and the effect is therefore *continuing* as to the *thing licensed*; and affords no license for another and *different* thing.

The short point decided is, therefore, that a change of grade in a railway is in itself a source of damage to property for which damages should be assessed, and is so where damages for location have been previously assessed, just as it would be if no previous proceedings for other purposes had occurred.

The proposition that a change of plan, causing fresh damages after the assessment of damages has been had, is ground for fresh recovery, has been laid down in the following cases, as well as those cited in the opinion: McCormick v. Kansas City, etc., R. Co., 57 Mo., 433; Kansas City, etc., R. Co. v. Kregelo, 32 Kan., 608; Hill v. Mohawk & H. R. Co., 7 N. Y., 152, 157; Carpenter v. Eastman, etc., R. Co., 24 N.

J. Eq., 249, 408; 26 N. J. Eq., 168; Wabash St. L. & P. R. Co. v. McDougall, 118 Ill., 229-238; s. c., on further hearing, 126 Ill., 111.

In the latter case the Court says: "In an original proceeding to condemn the measure of damages is the difference between the value of the land as a whole, before and after the construction of the road built according to the plan proposed." Chi. & P. R. Co. v. Francis, 70 Ill., 235; Page v. Chi., etc., R. Co., 70 Ill., 324; Eberhart v. Chi., etc., R. Co., 70 Ill., 347; Dupuis v. Chi. & North Wisconsin R. Co., 115 Ill., 97; C. B. & N. R. Co. v. Bowman, 122 Ill., 595. "If, after damages have been assessed, or settled by agreement, a change in the plan of construction involving more damages is made, the owner may demand a new assessment as to such increase of damages." Mills on Eminent Domain, 219.

A legislative precedent for this doctrine may be found in the numerous Mill Acts authorizing the compulsory flooding of lands for milling purposes on payment of compensation. Very early in the history of Virginia (1792), the Legislature provided that the owner of a mill dam might raise his dam by suing out a second writ to assess the first damages (1 Va. St. at Large, N. S., 136, 137, Va. Abr. Pub. Laws, 1796, p. 209, 211). And the original writ required an assessment of damages *so far as they could be foreseen, upon view*. This is preserved in the present Act. Code of Va., 1873, Title 19, C. 63, S. 11. And damages by breaking of the dam are recoverable at law as unforeseen (Wroe v. Harris, 2 Wash., 126). See also the similar statute and rule in Indiana (Honenstine v. Vaughan, 7

Black, 520). And this was followed in many of the Southern and Western States. See Gould on Waters, Ch. XIV, §§ 609, *et seq.*

The general rule of law, that where a permanent grade of a highway is established, the body changing the grade of the street is liable for damages caused by the change, is recognized by numerous authorities, in those States which admit of any recovery of damages caused by authorized public works *to property not taken*.

Goodall *v.* Milwaukee, 5 Wis., 32; Pearce *v.* Milwaukee, 18 Wis., 428; Goodrich *v.* Milwaukee, 24 Wis., 422; Crossett *v.* Janesville, 28 Wis., 420; Dore *v.* Milwaukee, 42 Wis., 108; Rigney *v.* Chicago, 102 Ill., 64; E. St. Louis *v.* Lockhead, 7 Ill., App. 83; E. St. Louis *v.* O'Flynn, 19 Ill., App. 64; Caledonian Ry. Co. *v.* Walker's Trustees, L. R., 7 App. Cases, 259; Leader *v.* Moxon, A.D. 1773, 3 Wils., 461, s. c., 2 Bl., 924; Rhodes *v.* Cleveland, 10 Ohio Rep., 159; M. Combs *v.* Akron, 15 Ohio Rep., s. c., 18 Ohio Rep.; Combs *v.* Pittsburgh, 18 Penn. Rep., 187.

Contra: Governor & Co. of British Cast Plate Mfrs. *v.* Meredith, A. D. 1792, 4 T. R., 794; Sutton *v.* Clark, 6 Taunt., 28; Jones *v.* Bird, 5 B. & Ald., 837; Callender *v.* Marsh, 1 Pick., 417; Rude *v.* St. Louis, 93 Mo., 408; Keasy *v.* Louisville, 4 Dana (Ky.), 154; Humes *v.* Mayor of Knoxville, 1 Humple (Tenn.), 403; Radcliff's Exrs. *v.* Mayor of Brooklyn, 4 N. Y. 195. And see Lewis, Eminent Domain, § 96, and cases cited.

But as will be seen by a casual reference to the authorities, the primary doctrine that damages by authorized public works to property

not taken may be recovered, itself of recent growth.

The rule forbidding recovery for change of street grade has been established prior to the constitutional changes admitting recovery for damages to property not taken. Now that these damages are generally recoverable, the case of damages from changes in the street grade should follow the constitutional change.

In some States these damages were recoverable before the change. See the Wisconsin authorities, cited *supra* and Ill. Grand Rapids, etc. Co. *v.* II Heisel, II N. W. Rep. (Mich.), 212; Eaton *v.* B. C. & M. R. Co., 51 N. H., 504; and in some they have been made specially recoverable by statutes thereon. See Ind. R. S., 1881, 3073; Iowa Code, 469; Mass. Sts., C. 44, 19, 20. For changes in the grade of streets of New York City, N. Y., see laws of 1852, C. 52, p. 46, 47; 2 L. 1867, C. 697, pp. 1748, 50 2 N. Y. L., 187; C. 729, p. 1726; Pennsylvania. See matter of change of grade of Fifth and Sixth Streets, 12 Phila., 58. For a collection of decisions on these statutes, see Lewis, Em. D. §§ 207-218.

The constitutional change itself is an interesting piece of history. In the early history of the country the rule had been settled, except in a few jurisdictions, that damages to property not taken could not be recovered.

By the Illinois Constitution of 1870, the constitutional provision was made to read: "Private property shall not be taken or damaged for public use without just compensation." So far as the writer has been able to ascertain this was the first constitutional provision expressly extending the

remedy to damages to property not taken : Ill. Cont., 1870, Art. II, § 13, 1 Starr & Curtis ; Ill. Statutes, p. 105, 1037.

Similar provisions have been since adopted in several States as follows : West Virginia, Art. III, § 9, in 1872 ; Pennsylvania (taken, *injured* or destroyed), Art. I, § 8, 1873 ; Arkansas (taken, damaged or destroyed), Art. II, § 22, 1874 ; Missouri, Art. I, § 20, in 1875 ; Nebraska, Art. I, § 21, in 1875 ; Alabama (same as Pennsylvania), Art. XIII, § 7, 1875 ; Texas, Art. I, § 17, in 1876 ; Colorado, Art. II, § 14, in 1876.

In England, the Land Clauses Consolidation Act of 1845 (§ 68) allows recovery of compensation for property "injuriously affected;" and this has been repeatedly construed to include damages to property not taken : Hall *v.* Mayor of Bristol, L. R., 2 C. P., 322 ; Ripley *v.* Great Northern R. R. Co., L. R., 10 Ch. App., 435.

The rule is, therefore, now well established in this country and England, and we may expect that it will become universal.

The limitation indicated in the opinion that the damage or injury must be "physical;" and that it will not include damages by obstruction of view, by noise, vibration, etc., results from an application to the question of various rules in the law of easements, including the right to build indefinitely, upward or downward, etc.

But a moment's reflection satisfies any one that "view" is a "physical" attribute, an injury to which is a physical injury ; that

noise and vibration are "physical" phenomena, and so far as injurious are physical injuries. A judicial definition of "physical," which would exclude these injuries, is unscientific and destined to modification. The language of the rule will be changed, and possibly the rule itself.

On principle there is ample room for argument that, in the compulsory divesting of one person's rights and investing of another persons' corresponding rights, for a *fair compensation* and fixed price, the divesting of one person's rights to view, to freedom from unwholesome surroundings, or to freedom from noise and vibration are elements to be included in the compensation. The right to the enjoyment of these is not *physical*, but *no right to enjoyment* is physical. The objects to which these rights apply and the *media* through which they are enjoyed and their *relation* to the *corpus* of the property taken *are* physical just as much as in any other case. The effect of such divestiture of rights is visible in the market value of the property and is measured by dollars and cents in the real estate world just as much as any other.

As the effect of the constitutional provisions above cited has been to enlarge indefinitely the scope of damages to be compensated, it may be anticipated that there will be a tendency to still further extend the field and to embrace all elements which affect the market value of the property.

MERRITT STARR.

Chicago, July 25, 1892.

EDITORIAL NOTES.

BY G. W. P.

THE AMERICAN LAW REGISTER AND REVIEW has continued the policy of the old *American Law Register* in the matter of publishing in each number some important recent decision of an American or English Court, together with an annotation or brief upon the point of law discussed in the principal case. The annotations have been found useful by the profession, but in these days of rapid reporting, when the West Publishing Company puts into the hands of lawyers all over the country the decisions of the various Courts in an incredibly short time after those decisions have been handed down, it has become well nigh superfluous to burden the pages of this journal with long opinions and reports of cases which can so readily be found elsewhere. It should seem that THE AMERICAN LAW REGISTER AND REVIEW would better discharge its duty to its many readers if it were to substitute for the reported decision and single annotation now published in each number a brief statement of the point decided in several important cases (with a reference to the reporter in which they can be found) and careful annotations upon each of the cases thus summarized. Accordingly it is the intention of the editors to make this change in the autumn of the present year, and they wish by making it, be enabled to offer to their readers in the course of a year not twelve only, but fifty or sixty, elaborate briefs upon points of law of vital interest to the profession.

The annotations which have been published heretofore have earned for their writers much favorable comment and have made themselves almost indispensable to the profession. But it is the aim of the present management to make these annotations in the future the work of specialists upon the branch of law which they discuss—not merely the work of able and scholarly lawyers who could write with equal

ity upon any legal topic to which their attention might directed. With this end in view a division of the whole of law has been made into some sixteen heads or groups, over each group a distinguished lawyer will preside as or of the annotations relating to his specialty. This or will be assisted by lawyers of his selection who will rotate decisions approved by him, and submit to him the ults of their labors for final criticism and correction. om time to time the writers of these annotations will pare, in consultation with their editor-in-chief, mono- phs or essays on some point of law relating to their spe- lity which will be published by the University of Penn- vania Press in a continuous and connected series, uniform th the successful work of Mr. George STUART PATTERSON "Contracts in Restraint of Trade," and with Mr. WILLIAM RAPER LEWIS'S able essay on "The Federal Power over ommerce." It is conceived that a lawyer in search of a orough and able discussion of a given point of law will nd in the annotations of THE AMERICAN LAW REGISTER ND REVIEW which bear upon his subject, and in the onographs relating to it, the very object of which he is in quest. And it is the editors' hope that this new system ill, before long, be patronized by the profession to such an extent that the management will feel justified in making her and further improvements in it.

Among the eminent lawyers who have consented to ke charge of particular branches of the law as editors of e annotations and monographs we may mention the fol- wing: Commercial Law, FRANK P. PRICHARD, Esq., of the hiladelphia Bar; Admiralty, MORTON P. HENRY, Esq., thor of "Admiralty Jurisdiction and Procedure;" Rail- ys and Transportation, CHARLES F. BEACH, Jr., Esq., of e New York Bar, and author of "Commentaries on Pri- e Corporations," etc.; Contracts in Restraint of Trade d Commercial "Trusts," H. LABARRE JAYNE, Esq., of Philadelphia Bar; Equity Jurisprudence, R. C. McMUR- E, Esq., of the Philadelphia Bar, and Patent Law, ORGE HARDING, Esq., of the Philadelphia Bar. The fol-

lowing well-known lawyers are among those who have been asked to act, and with whom the editors are in correspondence at the time of going to press : Civil Courts and Procedure, Hon. GEORGE M. DALLAS, of the Circuit Court of Appeals ; Torts, MELVILLE M. BIGELOW, Esq., of the Boston University Law School, and author of "Bigelow on Torts." Insurance Law, GEORGE RICHARDS, Esq., of the Columbia Law School, and author of "Richards on Insurance ;" and Criminal Law, GEORGE S. GRAHAM, Esq., District Attorney of Philadelphia. Other names of editors-in-chief will be announced hereafter, and it is hoped that before long a complete prospectus can be issued, giving the names of the assistant editors in connection with the department to which they will devote their attention.

The business risk involved in such a venture is, of course, great. The expenses of publication of THE AMERICAN LAW REGISTER AND REVIEW will be materially increased, and the cost of bringing out the monographs will be enormous. The management, however, feels confident that the American Bar will recognize the importance of this enterprise, and will see in it the means of obtaining for briefs and arguments material of a character not to be found in such completeness in any other publication. As a step in the development of American law this enterprise is not without its significance, and many thoughtful lawyers will be especially attracted by this feature of it. Upon the whole, we are confident that we can appeal to the profession for their cordial support and co-operation, and we predict that the announcement which will shortly be issued by the University of Pennsylvania Press will awaken great interest in all parts of the country.

BOOK REVIEWS.

STORY'S EQUITY PLEADINGS. Tenth Edition. Revised, Corrected and Enlarged. By JOHN M. GOULD, Ph.D. Boston: Little, Brown & Co., 1892.

"Story on Equity Pleading" is to the profession so old and tried a friend that the reviewer of a new edition must confine himself to a notice of the work of the editor and of the publisher. Even as to the latter nothing but a single statement need be made, to wit: that the work is published by LITTLE, BROWN & CO. This is equivalent to saying that everything that the printer and the binder can do has been done to make the book attractive. The paper is good, the typography is excellent—every feature may justly be spoken of with praise.

Dr. GOULD has done his part well, and his notes, in many instances, go far toward remedying admitted defects in the author's work. For example, Mr. Justice STORY gives his readers but scant information upon the important question of whether or not a given answer is responsive to the plaintiff's bill. The omission of a thorough discussion of this topic is almost as grave a defect in STORY'S work as is the insufficiency of STEPHENS' treatment of the scope of the general issue in his classic treatise on "Pleading at Common Law." Recognizing this, Dr. GOULD, on pages 693-695, prints a valuable note, in which he presents many authorities on responsiveness, and classifies the cases relating to the effect of an answer as evidence for the defendant. We could wish that he had given the subject a still more thorough investigation, for difficult and disputable questions are constantly arising with respect to it, and many of the cases seem to be in serious conflict.

The note on page 40, *et seq.*, on the subject of the prayer for general relief, is a valuable one; and the notes to the chapter on Bills of Interpleader and Certiorari furnish a good illustration of the ability with which the editor has supplemented the discussion contained in the text and notes of previous editions.

On the whole, it may be said that the editor has been remarkably successful in his effort "to adapt this standard treatise to all the needs of modern practice, as well in the States which have a code procedure as in those having a distinct system of equity."

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by TILGHMAN E. and EMERSON E. BALLARD. Crawfordsville, Ind.: Ballard & Ballard, 1892.

In this volume the editors have reported in full over one hundred cases decided during the year by State courts of last resort, and they have added to these several elaborate annotations and discussions, an index to decisions construing local statutes and an epitome of cases not important enough to be reported in full. The book represents the annual crop of real property cases yielded by the American courts, the wheat being separated from the chaff, and the whole ground into a form well adopted for the lawyer's "domestic use." With this book in hand one can keep abreast of the development of the law by reading the reported cases, for the editors report all cases in full (1) which overrule other cases on material points; (2) which construe important statutes not hitherto construed; or (3) which make some new application of legal principles. If one has the further object of investigating a particular point, he has at hand the admirable "Epitome of Cases" which, as a new volume, will be published each year, is justly characterized by the editors as "a growing and living 'brief' on all of the subjects about which the courts have anything to say."

The plan of the book is, in our judgment, an admirable one, and the execution of the plan seems to be in all respects satisfactory. But the true test of such a book lies in the constant use of it, and we shall be in a better position to pronounce a worthy judgment when the second "Annual" makes its appearance than we are at present.

IL DIRITTO COMUNE. Per O. W. HOLMES, JR. Translated (into Italian) by FRANCESCO LAMBERTENGHI. Sondrio: Tipografia A. Moro e. C., 1888.

This interesting volume has been sent to us but recently, although it was published, in limited edition, as

long ago as 1888. All admirers of Judge HOLMES' "Lectures on the Common Law" (that is to say, all *readers* of them), will be glad to learn that they have, by M. Lambertenghi's translation, been put within the reach of those who live in the very birthplace of the Civil Law. Not without the aid, we admit, of the more familiar Boston edition, we have examined a large part of the volume before us, particularly the fifth Lecture on "Bailment." The account of the celebrated Southcote's Case—*Caso di Southcote*—sounds strangely in the "soft Italian," and because of this we read with renewed interest of the later development of the doctrine of bailment and of Chief Justice PEMBERTON'S refusal "to follow the law of Lord COKE'S time to such extreme results"—"*di seguire fino a questo estremo il diritto del tempo di Lord Coke.*"

M. LAMBERTENGHI is to be commended for an undertaking that will materially assist Judge Holmes' work in attaining the world-wide reputation which it deserves.

DIGEST OF INSURANCE CASES FOR THE YEAR ENDING OCTOBER 31, 1891. By JOHN A. FINCH. Indianapolis: The Rough Notes Company, 1892.

Mr. FINCH, of the Indianapolis Bar, prepares annually for the publisher of the insurance journal, entitled *Rough Notes*, a digest of the insurance cases reported during the year in any of the long list of law journals published in the English language. The volume before us represents his latest effort, and it will be welcomed by the profession as a most useful work—what the editor, in his preface, is pleased to call "an indispensable necessity." An examination reveals the usual number of tiresome and dreary decisions, which the editor must, of course, digest, together with the really useful and interesting cases. The Kentucky Superior Court (p. 72) has discovered that where the assured makes truthful answers, and the company's agent writes down false answers, the company cannot defend upon the ground of their falsity. The Supreme Court of Canada is to be congratulated on this decision: "Two marks (") similar to those used for the word "ditto," placed under the word "no" in a column of answers, in an application for life in-

surance, make an answer which is evasive, if not false, and will vitiate the policy, when the word "yes" should have been written, instead of such mark, to make a true answer" (p. 112). While one possessed of all his faculties might have reached these conclusions unaided, it is well to have judicial sanction for the following proposition: that when a shot in the back of the insured produced total paralysis of the lower part of the body, he was entitled to recover under a policy payable upon "*the loss of two entire feet*" (p. 1).

Mr. FINCH has done his work well. The cases are carefully digested, the classification is good, and the index is remarkably complete.

THE PURITAN IN HOLLAND, ENGLAND AND AMERICA: AN INTRODUCTION TO AMERICAN HISTORY. By DOUGLAS CAMPBELL, A.M., LL.B., Member of the American Historical Association. Two Vols. New York: Harper & Brothers, 1892.

This interesting work belongs, of course, to the domain of political rather than legal history. But the author finds it necessary, in the development of his subject, to deal with the problem of the sources and growth of American institutions and American law, and to discuss the relations which they bear to the institutions and the Common Law of England. It is this portion of the work which will have an especial interest for the professional readers of THE AMERICAN LAW REGISTER AND REVIEW, and it is this portion, and this portion only, which it is proposed to discuss in this notice.

The author, in the opening paragraphs of his introduction, makes short work of the popular assumption "that the people of the United States are an English race, and that their institutions, when not original, are derived from England." He proceeds to show that the institutions of America are very old, being partly Roman and partly Germanic, and that they have come down to us *via* the Netherlands, where were preserved for many ages the Roman institutions and the Germanic ideas of freedom. Our legal

system, he contends, is derived from the Civil and not from the Common Law, and he suggests that the admirers of the latter regard it as the perfection of human reasoning, "upon the theory that knowing it to be ugly they think it must be great." Of more recent legal developments in this country he speaks in a similar vein; and his position upon the whole subject is best expressed in his own words: "Looking at our legal system to-day, it can almost be said that everything in it consistent with natural justice comes from Rome, and that everything incongruous, absurd and unjust is a survival of old English customs and English legislation." "Such statements," he adds naively, "as to the influence of the Civil Law upon the jurisprudence of England and America may seem novel to some readers; but the whole subject of the influence of Rome upon modern society is comparatively new." He enumerates some of "the more salient legal reforms" in which America has led England, instancing the Constitutional guaranty to the accused of the right to be represented by counsel, the liberty extended to the prisoner to testify in his own behalf, the simplification of procedure in the courts, "the virtual amalgamation of law and equity," and the emancipation of married women. He predicts that other reforms will come in time, such as the prohibition upon the disinheriting of children without just cause, and concludes: "but for no such reforms, either past or present, need we look to English precedents."

It is important for the author's purpose to minimize the debt which we owe to England, although, in somewhat sarcastic language, he disclaims any intention to do so. It is a debt, he declares, which "will never be ignored or outlawed." But the theory which he is endeavoring to support involves the conception of a glorified Puritanism emanating from the Netherlands and triumphant in America, its intermediate history being the record of a struggle for existence against adverse conditions in England. Hence we are not surprised when, in describing the state of England in the sixteenth century, he denounces in unsparing

language the immorality of clergy and people, the ignorance of the masses, the corruption of the judiciary, the absurdity of the Common Law, and when he laments, not without a trace of satisfaction, the decay of civil liberty. Then he tells of the ever-widening stream of immigration from the Netherlands, where "the Reformation began at the bottom," so that between the years 1560 and 1562 the number of refugees from Flanders had increased in England from ten to thirty thousand, and still the stream continued to flow. These refugees instructed the English in agriculture, manufacture and commerce; they aided in making England "Protestant and free;" they furnished the recruits for Cromwell's army, and it was from the places of their settlement that the hardy settlers of New England came. "Never," says Mr. CAMPBELL, "has the world beheld another missionary work on such a scale as this, nor one where the conditions were all so favorable. They came from a land filled with cities, which, until the days of Alva, had been the home of civil liberty, where trade was unshackled by monopolies or arbitrary impositions, where justice was impartially administered, imprisonment by royal warrant unknown, the pardon of criminals for money unheard of, where liberty of debate in their legislatures was unquestioned, and where taxes had been imposed only with the consent of the Government. They came to a land where almost every right was trampled under foot, where civil liberty, if it ever existed, was little more than a dim tradition. How their influence must have been exerted can be readily imagined."

We repeat, therefore, that it is important for the author's purpose to minimize the debt which we owe to England and, consequently, to find in the English Constitution and in the English law as it existed at the date of this immigration as few guarantees of civil liberty as possible, and as few effectual provisions for enforcing rights and redressing wrongs. Under these circumstances it would, perhaps, be unreasonable to expect a dispassionate and judicial examination of the claims of the Common Law

upon our admiration, and a perfectly impartial discussion of the relation subsisting between our written Constitution and the unwritten Constitution of England. But it is not unreasonable to expect that an author, especially when he is entering upon debateable ground, will avoid such extravagant and exaggerated language as that quoted above, to the effect that everything in our legal system consistent with natural justice comes from Rome; and it is difficult to listen with respect to such assertions as that every right (in the sixteenth century) was trampled under foot and that civil liberty, if it ever existed, was little more than a dim tradition.

When we examine the proofs which Mr. CAMPBELL adduces in support of these assertions, we find them unsatisfactory. After dwelling upon the absence of a State Church in America, he endeavors to break the connection between American and English "institutions" in five particulars—first, by contrasting the somewhat bombastic averment in the Declaration of Independence that "all men are created equal" with the English class system; second, by pointing out that ours is a written, the English an unwritten, Constitution; third, by comparing the single Executive in the United States with the king and cabinet in England; fourth, by noting the points of difference between the two legislative houses under our Constitution and under the English; and fifth, by commenting upon the supremacy of our Judiciary as represented by the Supreme Court of the United States. He further contrasts the laws in the two countries relating to the ownership of land, popular education and local self-government. It is obvious that in discussing whence we derived the provisions of our Constitution little is gained by remarking that the English Constitution is unwritten. It is also clear that the differences noted with respect to the conception of the citizen and the executive are incidental to the abandonment of monarchy; although it must not be forgotten that personal rule, the rule of a single Executive, did not cease in England until the death of William IV. We must be careful

not to read present conditions in this respect back into the past. With regard to the equal representation of the States in the Senate, if it be conceded that this feature, as well as the element of permanence, was copied after a Dutch model, it is to be remarked that many features which might with equal justice be referred to the same source were inserted in the Articles of Confederation and were found wanting in the hour of trial. On the other hand, we do not understand it to be seriously denied that the English House of Commons was present in the minds of the framers of our Constitution when they made provision for the lower house. The admirable distribution of power which gives supremacy to our Federal Judiciary is indeed a creation of our own, and one of which Mr. Campbell is justly proud. The land laws will be adverted to directly in connection with American jurisprudence, and local government and the common school system do not fall within the scope of this notice. It may be remarked, however, that the former is a thoroughly English conception; and as to the latter, it is well known that the school system set on foot by the Plymouth colonists fresh from Holland languished and failed to thrive, while the system established by the Massachusetts settlers, who were English to the backbone, may in fairness be called the parent of the modern New England system.

Turning to Mr. CAMPBELL'S discussion of our legal system, the lawyer's attention is at once arrested by this remarkable fact, that the denial to our jurisprudence of an English origin is based upon the indebtedness of the Common Law to Norman and Roman sources. It is somewhat surprising that Mr. CAMPBELL should fail to realize the incorporation of principles of Civil Law into the Common Law by such English jurists as Lord MANSFIELD is not an act of plagiarism, but a step in the development of English jurisprudence which made it not a whit less English. The author's contention is as if some one were to assert that "Paradise Lost" could not be included among English poems because Milton drew inspiration

and material from classical sources. "Most of our law," he says, "is a transplanted growth; very little, except the decayed or stunted shoots, having sprung from English soil. It is to Rome that we are indebted for almost all of our system of equity and admiralty; our laws relating to the administration of estates and the care of minors, the right of married women, bailments and, to a large extent, our whole system of commercial law. Following back the institutions which are England's boast, such as parliament, trial by jury and her judicial system, we find them derived, not from the Anglo-Saxon, but from the Normans, who were French by domicile and cosmopolitan by education." Surely there is need for definition here. If by the term "Common Law," Mr. CAMPBELL means the laws of England as William the Conqueror found them, his observations do not require consideration. If by that term he designates the system of jurisprudence, both law and equity, as it existed in England when MANSFIELD died, then it is proper to inquire once more by what right he denies to it the name English? What of those great jurists who have from age to age developed the jurisprudence of the High Court of Chancery and settled the law as it is administered in our courts to-day? If we are to be referred to bailments, what of Lord HOLT and the judgment in *Coggs v. Bernard*? Not English, we are told, because these great English men had studied the civil law! Then this "vigorous language" which we speak—for which Mr. CAMPBELL gratefully acknowledges his indebtedness to England—is not English after all. It has drawn upon Rome, both directly and through the Norman, the French and the other Romance languages. It has drawn upon the Greek and is still drawing. If it is not English now, when, it becomes pertinent to inquire, shall we be able to call any of our "institutions" or our legal system "American"—or, indeed, when shall we be able to call any of these things "ours?" It is this strange failure to conceive of the Common Law as an organism, growing and developing in harmony with the life of the English people, assimilating what was good in

other systems, undergoing constant changes and modifications, it is this strange failure, we venture to think, that vitiates much of Mr. CAMPBELL'S reasoning.

In view of these considerations it is obviously proper to apply, as we have already ventured to apply, the terms "exaggerated" and "extravagant" to Mr. CAMPBELL'S characterization of the doctrines of the Common Law. Even if we are referred by him to Elizabeth's reign—when he is pleased to consider that the liberty of the subject reached its lowest ebb—we discern the stern figure of Lord COKE to whose integrity MACAULAY paid an unwilling tribute; and we are instantly reminded that it was in Lord COKE'S time that the great Monopolies Case was decided and that the first signal triumph of equitable principles was recorded. We recognize that it was during that very period that many of the fundamental principles of our jurisprudence were formulated and many of our most venerated precedents were established. As to the state of the criminal law and the barbarous penalties inflicted under judicial sanction Mr. CAMPBELL'S language is perhaps not too severe. No reader of Mr. CARSON'S able articles in the June and July numbers of *THE AMERICAN LAW REGISTER AND REVIEW* will care to dissent from such condemnation.

Mr. CAMPBELL has much to say about the English land laws, the evils of primogeniture and the disadvantages which spring from a failure to adopt our recording system—a system, by the way, for which, it seems, we are indebted to the ancient Egyptians. He falls into a common error in attributing to the laws governing the transfer of real estate an undue importance; or, rather, he underestimates the importance of private laws—averring that, in comparison with the laws concerning religion, education and property, "the rules by which States or individuals transact their ordinary business are but minor matters." This is a strange assertion for a modern lawyer to make; it would have been approximately true a century ago.

With regard to the "reforms" to which reference has already been made but little need be said. The alleged

simplification of procedure is by no means an unmixed blessing ; and it should seem that the present English system of pleading, in which the scope of the general issue is restricted instead of being enlarged, is far preferable to our code pleading. The married woman's property Acts are fraught with sociological dangers, and the most sweeping of them are so recent that it is unsafe to boast much of the wisdom of such legislation.

On the whole, it is impossible for us to acquiesce in the view that no good thing has come to us from the Common Law ; and we venture to protest against what appears to us to be an attempt to manipulate our legal history to fit a preconceived theory. Interesting as Mr. CAMPBELL'S work unquestionable is, and plausible as are his arguments, the American student of English law will detect the presence of many a lurking fallacy ; and while he will recognize the value of a work which compels him to assume the defensive, he will nevertheless be able to justify the confidence which he feels in the correctness of his position.

AMERICAN RAILROAD AND CORPORATION REPORTS. Edited and Annotated by JOHN LEWIS. Vol. IV. Chicago: E. B. Myers & Co., 1892.

In this volume of upwards of eight hundred pages Mr. LEWIS gives to the profession in convenient form the most important corporation cases decided in Courts of last resort in the United States since January 1, 1891. The decisions here reported pertain to the law of railroads, municipal corporations, insurance, banking, carriers, telegraph and telephone companies, building and loan associations—in short, all the industrial enterprises which are carried forward through the instrumentality of the private corporation. Many of the decisions are followed by careful and elaborate annotations upon the point of law involved in the principal case. The work is provided with a digest-index, remarkably complete and accurate, containing references to both the reported cases and the notes.

The decisions which the editor has selected are, in

general, useful and important, and some of them will doubtless rank hereafter as "leading cases." *Shipman v. Bank of State of New York*, decided by the New York Court of Appeals, relates to the liability of a bank to its depositor for money paid out on a cheque drawn by the depositor, his clerk having stolen the cheque and forged the endorsement thereon. *Cincinnati Inclined Plane Ry. Co. v. City and Suburban Telegraph Ass'n*, from the Supreme Court of Ohio, investigates the relative rights of street railways and telegraph companies with respect to the use and occupation of public thoroughfares. The decision is to the effect that the prior grant of the use of a street to a telegraph company is subject to the right to establish and operate an electric railway thereon, inasmuch as the dominant purpose in the dedication and opening of streets is to facilitate public travel. Hence the telegraph company's claim to "ground circuit" is not superior, though prior. In *Briggs v. Spaulding*, the Chief Justice delivers the opinion of the Supreme Court of the United States. This was a bill framed upon the theory of a breach by the defendants, as directors, of their common-law duties as trustees of a financial corporation, and of breaches of special restrictions and obligations of the National Banking Act. The opinion discusses the personal liability of bank directors, and the Court decides, under the circumstances of this case, that there is no such personal liability on the part of the defendants since they had not been guilty of negligence or breach of duty. Three of the directors, however, had a narrow escape, as Mr. Justice HARLAN, with whom concurred Mr. Justice GRAY, Mr. Justice BREWER and Mr. Justice BROWN, filed a dissenting opinion on the ground that, as to the three, the evidence showed that they had not used the requisite degree of care, and that, with respect to the wrong-doing of a fellow official, "their eyes were as completely closed to what he did from day to day in directing the affairs of the bank as if they had deliberately determined not to see and not to know how he controlled its business." The case of *Handley v. Stutz*, the already

well-known decision of the same august tribunal, is also reported by Mr. LEWIS. This case may be said to represent the "high-water mark" of the doctrine that the unpaid capital of a corporation is a trust fund for the benefit of creditors.. The Court held (to quote from Mr. LEWIS's syllabus) that "the stockholders of the corporation, who voted to increase the capital stock eight hundred shares, and then distributed among themselves three hundred of those shares, without any consideration, must, at the suit of creditors of the corporation, which has become insolvent, respond for the par value of the shares, though they never expressly agreed to pay for the same, and though the stock is expressly declared to be fully paid and free from all claims or demands on the part of the corporation." The severity of the decision on this point is somewhat tempered by the refusal of the Court to enforce the same rule with respect to those who had purchased the new stock together with the bonds of the corporation in the market as the highest bidders ; it being conceded that, but for the stock bonus, the bonds could not have been negotiated. But in any view the decision is an extreme one, and it is interesting to observe its relation to *Wood v. Dummer*—the case in which Mr. Justice STORY originally propounded the trust fund doctrine. The use of the term "trust fund" is rather an absurdity in this connection, for the distinctive attributes of the trust fund are absent; and, at the same time, the true equities of a case could be better worked out by treating the stockholders as those who have made representations on the faith of which others have acted, and who must, therefore, be compelled to make them good. This is not the only instance in which Mr. Justice STORY must be made responsible for much that is absurd in the law in consequence of his adoption of plausible but dangerous grounds on which to attain a sound conclusion which might have been reached on sound principle. Witness his "general commercial law" doctrine in *Swift v. Tyson* and the confusion which has resulted from the refusal of the Federal Courts to be ruled by the provisions of the Judiciary Act with respect to the laws

of the States. And, indeed, as the reader will recollect, the bulk of the opinion in *Swift v. Tyson* is *dictum*, and against Mr. Justice CATRON recorded a vigorous dissent for the expressed reason that the point had never been raised by the record, argued by counsel or even mentioned in connection with the case until Mr. Justice STORY read his opinion.

One of the evil results of the trust fund explanation is seen in the refusal in *Handley v. Stutz*, following *Sawyer v. Hoag*, to permit one of the stockholders to set off his own claim upon the corporation against the claim of the creditors. This point is not noted by Mr. LEWIS in his syllabus; it is of such importance that it deserves specific mention. To this case Mr. LEWIS has added a valuable annotation, containing a large collection of the authorities upon the trust fund doctrine. Among them we notice a case already referred to—*Wood v. Dummer*—cited as *Ward v. Dummer*.

Mr. LEWIS'S volume is, on the whole, well worth attentive perusal, and to the lawyer with a brief to write it will prove only less useful than to the student who desires to keep abreast of the development of corporation law.

NOTES AND COMMENTS.

[The Editors are not responsible for the opinions expressed in this Department.]

THE HOMESTEAD RIOTS.

The recent disturbances at Homestead have excited some little inquiry, as indicated by communications in the public prints, as to the extent of an owner's right to repossess himself of his property by force without recourse to law, where taken possession of and held with force and threats by persons until then in his employ. Such right undoubtedly existed at common law for a long period, and extended to any disseisin by whomsoever effected. It was termed the right of entry, and was founded on the necessities of the case, which might often require, in justice to

the owner, a speedier remedy than the ordinary process of law could afford.

"But this," says BLACKSTONE,¹ "being found very prejudicial to the peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods even of doing themselves justice," and accordingly the statute of Richard II, C. 7. reads: "And also the King defendeth that none from henceforth make any entry into any lands and tenements, but in case where entry is given by law, and in such case not with strong hand, nor with a multitude of people, but only in a peaceable and easy manner, and if any man from henceforth do the contrary and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." The second statute of Edward III had already provided against the use of arms to strike terror into persons against whom entry was made, and other statutes followed having a similar purpose, "so that," continues BLACKSTONE, "the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, violence and unusual weapons."

It appears that in addition to the prohibition of these statutes a forcible entry against any one in possession was indictable as a misdemeanor at common law, and the injury was both of a civil and criminal nature, the civil being remedied by immediate restitution, and the criminal by fine and imprisonment.² The common and English statute law on the subject has been supplemented by statutes in the various States of this country defining the offence and its punishment. To constitute a forcible entry, it must be with such force and violence as is sufficient to excite apprehension, as distinguished from a simple trespass, and accompanied by a claim to the land, and the party injured must be in actual peaceable possession.

The reason underlying the law, as has been seen, is the maintenance of the public peace. "The public peace,"

¹ Commentaries, Book IV, p. 148.

² *Commonwealth v. Toram*, 2 Pars., 413.

says BLACKSTONE,¹ "is superior to any one man's private property, and if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention or endanger the peace of society."

An exception, however, is recognized in the books where an owner is forcibly deprived by his servants of the possession of his property. His right in such case to use force and violence in recapturing it, notwithstanding the statute, was always recognized. The proposition is set forth by HAWKINS, in his Pleas of the Crown, C. 28, § 32, p. 503, as follows: "That no one can be in danger of those statutes by entering with force into a tenement whereof he himself had sole and lawful possession both at and before the time of such entry, as by breaking open the door of his own dwelling or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, or by forcibly entering into land in the possession of his lessee at will." Citing Moor, 786, HAWKINS, however, adds the words "*sed quære*" after the statement, as though being somewhat doubtful himself of its authority. BISHOP, in his work on Criminal Law, however, adopts the proposition as stated by HAWKINS,² and it is expressly recognized in Pennsylvania by Judge KING in the case of *Commonwealth v. Keeper*.³

Neither the instance cited by HAWKINS of simply breaking open a door, nor the case ruled by Judge KING, involved any injury to the person; but if the rule in all its breadth be conceded, it may readily be imagined how the liberty it allows may result in serious consequences. As an exception to the inhibition imposed by the statutes against a right which formerly had no limitations, it would

¹ Book III, p. 4.

² Bishop Crim. Law, § 509.

³ 1 Ash., 146 (1828).

seem to leave that right in the same position it occupied before the statutes were passed, and might, stated in another way, amount to this: that an owner, whose access to his own property is forcibly or threateningly denied him by his agent, servant or lessee at will, may use the same force and violence in retaking it as if the positions were reversed and he were defending it from attack with violence from outside. Certainly if he is deemed to be still in possession under such circumstances, he is defending his possession in either case. What then has one a right to do in defending his possession?

Where a person is attacked in his own house he need retreat no further; he may turn on and kill his assailant, if this be apparently necessary to save his own life, nor is he bound to escape in order to avoid his assailant.¹ Not only is he excused from retreat when in his own house, but he has the same excuse when pursued into any building out of which he cannot escape without exposing himself to bodily harm.² And when resistance to a felonious attempt is concerned (*i. e.*, burglary, or arson, or felonious assault on the person), then the question of the ownership or the purpose of the building does not come up. If such felony is apparently attempted, and if it cannot be apparently prevented except by the taking of life of the assailant, then any person is justified in taking such life. Hence not only the owner of the house, but his friends, neighbors and *a fortiori*, his servants and guests may arm themselves for the purpose.³

And for similar reasons the protection of the law is thrown over those who intervene to prevent an apparent felonious attack on a church or bank.⁴

Now the reasoning upon which the owner's right to retake by violence, under the circumstances stated by HAWKINS is based, is not given in the books, though indeed it must conflict with the general reason underlying the law

¹ WHARTON on Homicide, § 541, and see note to § 455 as to the meaning of the term "a man's house is his castle."

² Id. § 550.

³ Id. § 549.

⁴ Id. § 551.

against forcible entries, inasmuch as the one case might involve as great a breach of the peace as the other.

It is said the servant's possession is the owner's possession, and we may readily concede that it is not necessary in order to constitute possession that the owner should be personally present on his property; and, further, that in many cases as against third parties the possession of his family, servants or agents is his own possession. But it would seem to be a wide stretch of reasoning to conclude from this that the servant's possession is the owner's possession even as against the owner himself, and when the owner no longer acknowledges him as a servant.

Not less absurd would it be to derive the fiction of possession in the owner, notwithstanding his forcible exclusion, from the constructive seisin in deed which was recognized by the common law in the ancestor for the purpose of inheritance by the heir in the absence of actual entry,¹ or by virtue of conveyance effected under the statute of uses, or for the purpose of enabling an owner out of physical possession to bring a real action, as, for instance, where it was deemed to be an actual seisin for such purpose if a man having title of entry, but not daring to enter through fear of bodily harm, approached as near as he dare and claimed the land as his own.² The object of entry and its constructive equivalent in such cases is notoriety of title, and such consideration does not enter into the case in hand, as there can be no question here whose is the title, and even if there were, the question of title does not enter in the case of forcible entry.

But one possible reason would seem, therefore, to remain undisposed of, and that is the one above quoted underlying the right of entry as originally existing before the statutes were passed, to wit, the "necessities of the case which might often require in justice to the owner a speedier remedy than the ordinary process of law," or, in other words, as put by a learned judge, the protection to one's home.

¹ 2 Kent, 385.

² See *Green v. Lister et al.*, 8 Cranch, 246.

But it is submitted that the very circumstance which would now in the absence of such exception subject the owner to indictment for forcible *entry* would likewise subject the servant to indictment for forcible *detainer*, and if he might at once upon the first act of insubordination of the character mentioned subject himself to arrest, the strong arm of the law would afford a surer and speedier method of giving the owner access to his property without occasioning a breach of the peace, than his own act.

"The same circumstances," says RUSSELL on Crimes,¹ "which make an entry forcible will also make a detainer forcible. And it hath been said that he also shall come under like construction who places men at a distance from the house in order to assault any one who shall attempt to make entry into it."

"If a man undertakes to retain what he knows to be a wrongful possession by force or by numbers reassembling exciting terror he is guilty of a forcible detainer."²

The offence in Pennsylvania forms the subject of a separate section of the Act of March 31, 1860,³ which provides that "if any person shall by force and with strong hand or by menaces or threats unlawfully hold and keep possession of any lands or tenements, whether the possession of the same were obtained peaceably or otherwise, such person shall be deemed guilty of forcible detainer, and upon conviction thereof will be sentenced to pay a fine not exceeding \$500 or to undergo an imprisonment not exceeding one year or both or either at the discretion of the Court, and to make such restitution of the lands and tenements unlawfully detained as aforesaid."

There seems, therefore, to be no longer any reason for the exercise by the owner of a right which involves a breach of the peace; and, consequently, *cessante ratione, cessat ipsa lex*.

J. PERCY KEATING.

JULY 30, 1892.

¹ 9 Am. Ed., 427.

² Am. & Eng. Encyc. of Law. "Forcible Detainer," p. 111, and cases cited.

³ Purd. Dig., 320.

ABSTRACTS OF RECENT CASES.

[Selected from the current of American and English Decisions.]

BY

HORACE L. CHEYNEY, HENRY N. SMALTZ, JOHN A. MCCARTHY.

ADMIRALTY—JOINDER IN LIBEL OF SHIP AND OWNER.—RIGHT TO PROCEED IN REM FOR INJURIES RESULTING IN DEATH.—A.'s personal representative libelled a tug for injuries received in a collision by A., a passenger on the tug, from which death resulted in about ten minutes. A local statute gave to the personal representative a cause of action for death caused by negligence, but gave no lien or privilege upon the offending thing. The original libel was amended by proceeding *in personam* against the owners of the tug, as well as *in rem* against the tug. *Held* (affirming the decree below): (1) that the joinder of ship and owner violated Admiralty Rules 12 to 20 inclusive; and that if the amendment was treated as an independent libel *in personam*, it was defective in failing to aver that the respondents were owners; (2) that since the local law gave no lien, a proceeding *in rem* could not be maintained in the Admiralty, and, as there was no averment that sufferings of deceased were not practically contemporaneous with death, it was unnecessary to decide whether or not a right *in rem* as to them passed to the personal representatives under the local statute: *The Corsair*, Mr. Justice BROWN, May 16, 1892 (145 U. S., 335).—*G. W. P.*

BANK—CREDIT FOR RETURN OF FUNDS WRONGFULLY WITHDRAWN—NOTICE TO CO-DIRECTORS.—A., the cashier and afterward the president of the Albion Bank, engaged in stock speculation, and, for his own purposes, drew in favor of his brokers upon his bank's balance with its New York correspondent. The brokers from time to time returned to the New York bank sums to be credited to the Albion, which deposits were reported in the usual way. Upon the insolvency of the latter, the receiver sued the brokers, who claimed credit for sums returned, although no officer of the Albion Bank (except the defaulter A.) had received actual notice of these deposits. *Held* (reversing the Court below): that it was at least a question for the jury whether A.'s fellow officers, in the exercise of reasonable care, could have ascertained that these deposits had been made to the credit of their bank, and whether they would have accepted them as a return of moneys to it: *Kissam v. Anderson*, Mr. Justice BREWER, May 16, 1892 (145 U. S., 435).—*G. W. P.*

BANK—SPECIAL DEPOSIT—TRUST.—A banker became surety upon an appeal bond in a suit against an accident association. To indemnify him against loss the accident association deposited with him a sum of money, receiving a certificate of deposit stating the object of the deposit. This sum was paid by a check of the association, and with its knowledge the check was collected by the banker and the proceeds were used by him in his business. Upon the insolvency of the banker it was held that the deposit was a general one, and, therefore, no trust was created

which would entitle the association to recover its amount in full in preference to claims of other creditors: *Mutual Accident Association of the Northwest v. Jacobs*, Supreme Court of Illinois, May 12, 1892, CRAIG, J. (31 N. E. Rep., 414).—*H. L. C.*

BANKS—DRAFT FOR COLLECTION—INSOLVENCY.—A bank which had received a draft for collection, sent it in town to its correspondent bank at the residence of the drawer, where it was regularly paid when presented. The latter bank had no account with the bank which sent it the draft, but was in the habit of remitting the proceeds of drafts every five days. Before the proceeds of this draft were remitted by the correspondent bank, the first bank became insolvent. It was held that the original owner of the draft could recover the proceeds of the draft in the hands of the correspondent bank: *National Exchange Bank of Dallas v. Beal*, Circuit Court of the United States, District of Massachusetts, May 4, 1892, PUTNAM, J. (50 Fed. Rep., 355).—*H. L. C.*

CARRIERS OF FREIGHT—DISCRIMINATION—CONTRACT IN VIOLATION OF PUBLIC POLICY.—Where a railroad company has a fixed rate or charge for the transportation of property, but it has favored customers for whom it will transport such property at a lower rate, by first charging the full price and afterward when the transaction is completed, paying back a certain proportion thereof as rebate; and the owner of freight procures it, by an agreement with a favored customer, to be transported in the name of such favored customer who afterward receives the rebate. *Held*: in an action by the owner of the property against the favored customer for the recovery of the rebate, that the whole transaction was founded in a violation of public policy and void, and the plaintiff could not recover: *Hanley v. Texas Coal Co.*, Supreme Court of Kansas, May 7, 1892 (30 Pacific Rep., 14).—*J. A. McC.*

CERTIFIED CHECK—INSOLVENCY OF BANK—DISCHARGE OF DRAWER OF CHECK.—If the payee or holder of a check in his own behalf, or for his own benefit, gets it certified instead of having it paid, then the drawer is discharged from liability on the check if the bank becomes insolvent before it is paid: *Minot v. Russ*, Supreme Judicial Court of Massachusetts, June 20, 1892, FIELD, C. J. (31 N. E. Rep., 406).—*H. L. C.*

COMMON CARRIERS—CONNECTING LINES—LIMITING LIABILITY.—Where a common carrier receives goods for transportation to a point beyond its own line, the carrier may by contract protect itself against liability for loss not occurring on its own line: *McCam v. International & G. N. R. Co.*, Supreme Court of Texas, April 15, 1892, STAYTON, C. J. (19 S. W. Rep., 547).—*H. L. C.*

CONTRIBUTORY NEGLIGENCE.—CROSSING ACCIDENT.—Even though the train which injured the plaintiff was going at a faster rate of speed within the city limits than that allowed by a city ordinance, yet he cannot recover, if it is shown that had he stopped and looked at a point thirty-five feet from the crossing where the accident occurred, he might have avoided the danger: *Sala v. Chicago R. I. & P. R. R. Co.*, Supreme Court of Iowa, May 27, 1892, ROBINSON, C. J. (52 Northwestern Reporter 664).—*J. A. McC.*

COUNTIES—LIABILITY FOR NEGLIGENCE.—Counties are involuntary corporations, organized as political subdivisions of the State for governmental purposes, and are not liable any more than the State would be liable for the negligence of its officers or agents, unless made liable by statute: Board of Commissioners of Vigo County, Supreme Court of Indiana, June 7, 1892, MILLER, J. (31 N. E. Rep., 531).—*H. L. C.*

COUNTIES—LIABILITY FOR NEGLIGENCE.—A county is not liable for personal injuries caused by a defective bridge, unless such liability be created by statute, either by express words or by necessary implication: Heigel v. Wichita County, Supreme Court of Texas, April 22, 1892, GARRIES, J. (19 S. W. Rep., 562).—*H. L. C.*

DEED—UNDUE INFLUENCE—CONFESSOR AND PENITENT.—When a person is ignorant or mistaken with respect to his existing legal rights, and enters into some transaction, the legal effect of which he correctly apprehends and understands, for the purpose of effecting such assumed rights, equity will grant its relief, defensive or affirmative, treating the mistake as analogous, if not identical, with a mistake of fact. Therefore, where the complainant, thinking a paper showed him by the defendant, his confessor, was a revocation of a will made by the complainant's brother in his favor; and the defendant, knowing the paper had no legal effect, induced the complainant to execute a trust deed over the property in favor of the church of which the defendant was pastor: *Held*: That equity would interfere in favor of the complainant, not only because of the defendant's fraud, but also because of the relation he bore to the complainant: Finegan v. Theisen, Supreme Court of Michigan, June 10, 1892, McGRATH, J. (52 N. W. Reporter, 619).—*J. A. McC.*

DEMURRAGE—BERTH—WHEN TO BE FURNISHED IN ABSENCE OF STIPULATION.—In the absence of any charter stipulation as to time within which a berth shall be provided for a vessel after her arrival, the berth must be provided within a reasonable time, or such time as usage prescribes. By the ordinary usage of the port of New York, twenty-four hours after notice of arrival is allowed for procuring a berth: The "Arthur Holme," District Court of the United States, Southern District of New York, April 26, 1892, BROWN, J. (50 Fed. Rep., 434).—*H. L. C.*

DEMURRAGE—LIABILITY OF CONSIGNEE—BILL OF LADING.—In the absence of a stipulation in a bill of lading that the consignee shall be liable for detention of vessel, there is no liability upon his part for detention of the vessel at the port of loading, by the shipper. The latter alone is liable, and this is true, although the contract of affreightment with the master of the vessel may have been made by the consignee: Van Ettere v. Newton, Court of Appeals of New York, June 7, 1892, PARKER, J. (31 N. E. Rep., 334).—*H. L. C.*

EJECTMENT—RES JUDICATA—COMITY.—A. sued B. in ejectment in the State Court of Kansas. While this action was pending a foreclosure proceeding was instituted concerning the same subject matter in the United States Circuit Court in which A. and B. were parties defendant. In the foreclosure proceeding B. filed a cross bill setting up title in himself to the same land, with a prayer that his title be quieted. A. appeared

and answered the cross bill, setting up his chain of title. The issue of the cross bill was found in favor of B., and a decree was entered affirming and quieting his title to the land. To the declaration in ejectment in the State Court B. filed a supplemental plea setting up the decree of the Federal Court in bar of the action. *Held*: An effectual bar upon the principle that while the rule founded upon comity, which subsists between judicial tribunals, is that the Court which first acquires jurisdiction of the persons and subject matter of an action will retain the cause until it is finally determined, yet where the parties, while such suit is pending in ejectment, submit the controversy therein involved without objection to another tribunal, having jurisdiction of the subject matter, the judgment pronounced in the latter Court is binding upon the parties: *Gregory v. Kenyon*, Supreme Court of Neb., May 18, 1892 (52 Northwestern Rep., 685).—*J. A. McC.*

ELECTION OF ACTIONS.—Where a contract in writing for the sale of lumber reserves the title to the lumber in the vendor until the purchase money is paid, so as to amount, in effect, to a mortgage, the vendor may elect to sue for the debt, instead of enforcing the mortgage. *Munroe et al. v. Williams et al.*, Supreme Court of North Carolina, March 25, 1892 (15 S. E. Rep., 279).—*R. D. S.*

EVIDENCE—RES GESTA OPINION.—A railroad brakeman who was on a platform car was injured while the car was making a running switch. The engineer of the train walked back to the point where the brakeman was, reaching there about two minutes after the accident occurred. The brakeman then made certain statements as to the accident, and the engineer said to him that if the engine had been repaired the night before the accident would not have occurred. It was held that the statements of the brakeman as to matters other than those which occurred prior to the accident were admissible in evidence, but that the statement of the engineer was inadmissible, as it was a mere combination of opinion and a narrative of events which had occurred prior to the accident: *Ohio & M. Rwy Co. v. Stein*, Supreme Court of Indiana, May 14, 1892, *ELLICOT*, J. (31 N. E. Rep., 181).—*H. L. C.*

INJURIES TO VOLUNTEER—ASSUMPTION OF RISK.—Where the head brakeman of a train called to the plaintiff, a bystander at the station, to assist in the switching, and while the latter was doing so he received injuries caused by the movement of certain car trucks which were loaded on one of the cars, and which were not properly blocked. *Held*: That the plaintiff could not recover since the brakeman had no authority to assist in the switching. The fact that the existing force might have been insufficient to do the work did not, under the circumstances, give him any implied authority to do so; that if any one on the ground had such authority it was the conductor: *Church v. Chicago and St. P. Rwy Co.*, Supreme Court of Minnesota, June 22, 1892, *MITCHELL*, J. (52 Northwestern Reporter, 647).—*J. A. McC.*

INTERSTATE COMMERCE — DISCRIMINATION — "PARTY-RATE" TICKETS.—It is provided by Section 1 of the Act of February 4, 1887, that no "unjust and unreasonable charge" shall be made by a common

carrier for the transportation of passengers between States. Section prohibits "unjust discrimination" by the carrier against any individual and Section 3 makes it unlawful for the carrier to give "any undue or unreasonable preference or advantage to any particular person." A railway company, engaged in interstate business within the terms of the Act issued "party-rate" tickets for the transportation of ten or more persons between points in different States at a rate lower than that charged an individual for similar transportation on the same trip. *Held*: (1) That the issue of such a ticket did not infringe against any of the sections of the Act above cited; and (2) that Congress, in adopting the language of the English Traffic Act in the Act to regulate commerce, must be taken to have had in contemplation and to have incorporated into the statute the construction put upon that legislation by the English Courts: *Interstate Commerce Commission v. B. & O. R. R.*, Mr. Justice BROWN, May 16, 1892 (145 U. S., 263).—*G. W. P.*

LEASE—IMPLIED COVENANT—PROPERTY AT SUMMER RESORT.—In a lease of a completely-furnished dwelling-house at a summer resort for a single season there is an implied covenant that the house is in a fit condition for immediate habitation: *Ingalls v. Hobbs*, Supreme Judicial Court of Massachusetts, May 9, 1892, KNOWLTON, J. (31 N. E. Rep., 286).—*H. L. C.*

LIQUOR LAW—SALE IN VIOLATION OF ORDINANCE—SUIT BY VENDOR TO RECOVER PRICE—FEDERAL COURTS AND LOCAL LAW.—The City of Chicago passed an ordinance making it penal to sell liquor without a license. A., in violation of the ordinance, sold liquor to B. and subsequently brought suit in the Federal Courts for the price. After the sale, the Supreme Court of Illinois had occasion in another case to consider for the first time the validity of this ordinance and they decided in favor of its validity. B. pleaded the ordinance; A. demurred, and the Circuit Court having sustained the demurrer, it was *held* (reversing the Court below): (1) that since this was a local question, affecting solely the internal policy of the State and involving no Federal question or principle of general commercial law, the decision of the Supreme Court of Illinois in favor of the ordinance should control; (2) that the contract of sale, made in violation of a valid ordinance, was void and fell under the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce: *Miller v. Ammon*, Mr. Justice BREWER, May 16, 1892 (145 U. S., 421).—*G. W. P.*

LIVERY STABLE—LIEN FOR BOARD OF HORSE.—Where a horse is left at a livery stable by a bailee who has no authority from the owner of the horse to place it in such stable, the keeper of the latter acquires no statutory lien on the animal for the keeping. It is not a question of notice but a matter of property right, in which the doctrine of *caveat emptor* applies: *Domnan v. Green*, Court of Appeals of Texas, June 25, 1892, DAVIDSON, J. (19 S. W. Rep., 909).—*H. L. C.*

NEGLIGENCE—SALE OF DEFECTIVE MACHINERY—INJURY TO ONE NOT A PARTY TO THE CONTRACT.—The vendor of defective machinery

is not liable for an injury sustained by a servant of the vendor unless there is evidence to show that the vendor had knowledge of its defective character: *Heizer v. Kingsland & Douglass Manufacturing Company*, Supreme Court of Missouri, May 23, 1892, BLACK, J. (19 S. W. Rep., 630).—*H. L. C.*

NEGOTIABLE INSTRUMENTS—ENDORSEMENT AFTER MATURITY—RIGHTS OF ENDORSEE.—When a negotiable instrument is endorsed after maturity by one to whom it was transferred before maturity, the endorsee after maturity occupies the same position as was occupied by his endorser, and no defence which could not have been made against the note in the hands of the latter can be made against it in a suit by the endorsee after maturity: *Matson v. Alley*, Supreme Court of Illinois, May 12, 1892, SCHOFIELD, J. (31 N. E. Rep., 419).—*H. C. L.*

PARTNERSHIP—EFFECT OF AGREEMENT TO SHARE PROFITS.—A. loaned money to a firm under an agreement by which he was to receive, in addition to interest, one-tenth of the net profits of the firm over and above a certain sum. A. received annual accounts of profit and loss, and actually participated in profits. A. died, and a firm-creditor sued his executor on a partnership note. At the trial the Court below granted a non-suit. *Held*: that those persons only are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions; that in this case a jury would not have been justified in inferring on the part of A. either "actual participation in the profits as principal," or that he authorized the business to be carried on in part for him or on his behalf; and that, therefore, the Court below committed no error in non-suiting the plaintiff: *Meehan v. Valentine*, Mr. Justice GRAY, May 16, 1892 (145 U. S., 611).—*G. W. P.*

POLICY OF INSURANCE—BENEFICIARIES—CHILDREN.—When a policy of insurance upon the life of a man is made for the sole use of his wife, if living, in conformity with the statute, and if not living then to her children or their guardians, if one of the children and the wife successively die during the life time of the insured, upon his death the entire amount of the insurance is to be paid to the children who survive the insured; the representatives of the deceased daughter take nothing, as her interest under the policy is contingent upon her surviving the insured: *Walsh v. Mutual Life Insurance Co.*, Court of Appeals of New York, May 24, 1892, GRAY, J. (31 N. E. Rep., 228).—*H. L. C.*

RAILROAD MORTGAGE—DISTRIBUTION UPON FORECLOSURE—JUDGMENT FOR LAND TAKEN—PRIORITY.—A railroad company, whose line was partly constructed, issued certain bonds which were secured by a mortgage upon its line. Subsequent to the creation of this mortgage and the sale of the bonds, the company constructed another portion of contemplated line. Certain owners of land abutting upon this portion of the line brought suit against the company for consequential damages arising out of the construction and operation of the line. It was held that judgments upon these suits were entitled to priority of payment

over the bondholders : Penn Mutual Life Insurance Company *v.* Heiss, Supreme Court of Illinois, May 9, 1892, SHOPE, J. (31 N. E. Rep., 138).—*H. L. C.*

REFORMATION OF NOTE.—Plaintiff held a note, signed "Herndon Natural Gas Co. F. A. Percival, President ; A. Hastie, Secretary," given for the exclusive benefit of the company. In executing it P. and H. intended to bind the company only, and the plaintiff had no reason to believe otherwise. *Held* : in an action against P. and H., the defendants were entitled to have the note reformed to express the true contract of the parties, and parol evidence was admissible to establish such contract. *Lee v. Percival, et al.*, Supreme Court of Iowa, May 26, 1892, ROBINSON C. J. (52 N. W. Rep., 543).—*J. A. McC.*

RECISION OF CONTRACT OF SALE—TENDER OF PURCHASE MONEY.—A suit for a recision of contract of sale on the ground of fraud on the part of the purchaser cannot be maintained where the purchase money paid has not been returned nor a tender made, although the vendor may have expended the amount received prior to the discovery of the fraud and is unable to raise the amount necessary to make the tender. This defect is not cured by an allegation that if the contract should be rescinded that defendant will have in his hands property of the plaintiff largely exceeding in value the amount of the purchase money : *Rigdon v. Walcott*, Supreme Court of Illinois, May 12, 1892, BAILY, J. (31 N. E. Rep.).—*H. L. C.*

REMARKS OF COUNSEL.—When the prosecuting attorney, during the trial of a criminal proceeding, challenges the counsel for the defendant to explain the evidence upon any other reasonable hypothesis than that of guilt, and makes use of the latter's failure to do so in argument before the jury, such conduct cannot be objected to as tending to shift the burden of proving innocence on the defendant : *People v. Hall*, Supreme Court of California, May 28, 1892, *per curiam* (30 Pacific Reporter, 1).—*J. A. McC.*

WRIT OF PROHIBITION—DISCRETION OF COURT—WHEN EXERCISED.—In this country the writ of prohibition is not granted in any case *ex debito justitiæ*, but rests in the sound discretion of the Court, to be favorably exercised only when the ordinary forms of relief are insufficient and never if the complaining party has another adequate remedy at law. The only inquiries permitted upon prohibition are whether the inferior tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction over the subject-matter, has exceeded its legitimate powers. But an ordinance which provides that the license and the money paid therefor shall be and remain forfeited, although an acquittal should take place upon appeal and trial *de novo*, and prescribes both fine and imprisonment as penalties for its violation, is void, as being oppressive and unreasonable, and in excess of the statutory power to enforce ordinances "by a proper fine, imprisonment, or other penalties ;" and it is therefore proper to award a writ of prohibition to prevent a Court from proceeding to enforce it : *McInerney v. City of Denver, et al.*, Supreme Court of Colorado, February 15, 1892 (29 Pac. Rep., 516).—*R. D. S.*

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BELIEF IN THE PRETERNATURAL AND ITS
EFFECT UPON DISPOSITIONS
OF PROPERTY.

II.

TESTAMENTARY DISPOSITIONS.

BY ARDEMUS STEWART, ESQ.

THIS is the most frequent phase of the preternatural with which courts of law have had to deal. There are two distinct classes of cases: First, those in which the testator's belief is not shown to have had any influence upon the disposition of his property; second, those in which that belief either can be directly proven to have influenced him in the making of his will, or in which circumstances point with irresistible force to that conclusion. The first class falls within the operation of the rule laid down by C. J. Cockburn in *Banks v. Goodfellow*,¹ that where the mind of a testator is affected by an insane delusion, but it does not appear that that delusion had any influence upon him in

¹ 5 L. R. Q. B., 549 (1870). It may be worth noting that in that case one of the two delusions under which the testator labored was that spirits were pursuing him.

regard to the disposition of his property, his testamentary capacity cannot be said to be impaired by the delusion, his will is to be held valid. This is now the accepted rule in both England and America; and in order to raise the question of delusion, it must first be shown that the belief of the testator had an influence upon his will; or, if no such evidence of his belief be already given, it will be stricken out.¹

In regard to the second class of cases, the question is twofold. First, is a belief in the preternatural in any of its phases an insane delusion? and second, does such a belief exert so controlling an influence over the mind of a testator as to amount to an undue influence? The first question may be considered as finally settled in the negative, in spite of the many plausible and even cogent arguments to the contrary that have been advanced. No religious belief or belief in any form of the preternatural, however monstrous or perverted it may appear to us, is, of itself alone, an insane delusion in the eye of the law.² Accordingly it has been held that a belief in the transmigration of souls, in the hopeless damnation of one's own soul,⁴ in purgatory, in a peculiar compensatory relation between conduct on this earth and the assignment of rewards and punishments in the world to come,⁶ in witchcraft,⁷ and in spiritualism,⁸

¹ *La Bau v. Vanderbilt*, 3 Redf. (N. Y.), 384 (1877).

² *Denson v. Beazley*, 34 Tex., 191 (1871). "If the true test of the presence or presence of insanity is the absence or presence of delusion, then insanity and delusion become the same thing; or at least are no more than different terms used to designate the same condition of mind. To say by such a metaphysical or psychological test, Emanuel Swedenborg, John Wesley, Martin Luther, Joan of Arc, Joseph Addison, and the authors of *Rasselas*, Napoleon Bonaparte, and hundreds more of the greatest and soundest minds which ever existed on earth, must be declared insane. For each of these stoutly maintained what men of the present day would declare delusions."

³ *Bonard's Will*, 16 Abb. Pr. N. S. (N. Y.), 128.

⁴ *Weir's Will*, 9 Dana (Ky.), 434.

⁵ *Newton v. Carbery*, 5 Cranch, C. Ct., 626.

⁶ *Gass v. Gass*, 2 Humph. (Tenn.), 278.

⁷ *Van Guysling v. Van Kuren*, 35 N. Y., 70.

⁸ *Otto v. Doty*, 61 Iowa, 23; *Turner v. Hand*, 3 Wall, Jr., 88; *Constitutional Ins. Co. v. Delpouch*, 82 Pa., 225.

not insane delusions. The reasons for this ruling, briefly stated, are the following: In the first place, the belief in the preternatural seems to be an essential part of man's nature; and while this is mainly true of what are properly called religious beliefs, yet it renders him prone to fall into the grosser forms of superstition and idolatry, to which witchcraft and the phenomena of spiritualism are closely akin. Childhood is especially liable to be imposed upon in this way; and the impressions then received often become so firmly rooted as to be ineradicable by the light of reason in after years.¹ These beliefs have been prevalent at all times in the history of mankind and among men in all conditions of life. "If ever there was a doctrine of which it could be said that it was held *semper, ubique, et ab omnibus*, this is one."² As it is one of the essentials of an insane delusion that the mind of the person possessed by it should be completely under its control, the fact that this special form of belief does not incapacitate those who hold it from managing their own affairs with success has been held to be a strong proof that they were not under the influence of an insane delusion;³ and it is another essential of an insane

¹ Leech *v.* Leech, 1 Phila., 224; Thompson *v.* Quimby, 2 Bradf. (N. Y.), 449; *In re Vedder*, 14 N. Y. State Repr., 470.

² Thompson *v.* Quimby, *supra*. "From the visits of the angel to Lot, and others of the patriarchs (without referring to the scenes in the garden of Eden), down to this time when the spirits, like Poe's stately midnight raven, come gently rapping, rapping at the chamber doors of modern mediums, some of whom are eminent persons, the world, Pagan, Jewish and Christian, have, to a greater or less extent, believed in spiritual existences, some being good and some evil, which have maintained a connection with, and manifested their powers through human beings—in the case of the witch of Endor to even raising the dead."

³ Lee *v.* Lee, 4 McCord (S. C.), 183. When the testator was a man of strong belief in the pretended communications of mediums, but readily abandoned his belief in them when it could be demonstrated to him that they were in the wrong, his belief was held no delusion. Chafin Will Case, 32 Wis., 557. So, also, where the testator was a man of intense faith in his own judgment, and subjected everything to its test, so that, although a firm believer in spiritualism, he came, in the words of one witness, to believe "that there were more than one kind of spirits—some might try to fool him, and others might not," there could be no delusion. Will of J. B. Smith, 52 Wis., 543.

delusion that it does not rest on any basis of fact, and is not the result of any process of reasoning, these beliefs which (even the impostures of spiritualism), depend to some extent upon the evidence of the senses, however deceived cannot be held delusions. They may be due to imposition or deception, ignorance of common scientific phenomena, or to a wholly perverted train of reasoning; but they cannot be said to be delusions. It cannot be expected that all men should understand the phenomena of even every-day experience in the same light, or should be able to carry out a faultless chain of logical reasoning to its correct results in regard to all the matters which may fall within their observation. To a mind already predisposed in a particular direction, facts invariably take on a very different aspect from that in which they will appear to one who is without that bias; and there is no phase of human experience in which the truth of this is more clearly shown than in this very matter of preternatural belief. It would scarcely be an exaggeration to say that in the service of the Evil One himself there have not been the enormities perpetrated that have been done openly under the cloak of religion, by those who there is every reason to suppose honestly believed that they were "doing God service." It is also true that the opportunities for education and cultivation possessed by men are widely different; and there can be no hard and fast rule applied, by which to judge of the mental state of all mankind. The ignorant and superstitious may well be pardoned for firmly believing that which to the educated man seems the most puerile folly; and there is the least foundation in apparent facts for that belief; it cannot be held to be an insane delusion.¹

But the strongest argument of all is, that it is utterly impossible to have any certain criteria of the truth of most, if not all, preternatural beliefs; that we cannot say with positiveness that one who differs with us on any tenet, or who holds a peculiar doctrine which may seem to us wholly

¹ *Middleditch v. Williams*, 45 N. J. Eq., 725.

irrational and destitute of foundation, is therefore wrong, and if he persists in his belief, of unsound mind. It is, of course, perfectly patent that if the other man were asked his opinion, he would declare that we, and not he, were the insane. The general consensus, of belief certainly counts for something; but it can hardly avail to prove insanity in one who differs with it. Otherwise, many of the best and greatest of the world's benefactors—those who have brought about the greatest reforms and have given the most powerful impulse to our onward progress, would be reckoned insane. Delusion in its legal sense cannot be predicated of speculative beliefs.¹

This conclusion is strongly combatted by Justice CLERKE, in a dissenting opinion, in *Thompson v. Thompson*,² but ineffectually, although there would seem to have been strong reasons in some of the cases, for holding that the testator was insane.³ Judge REDFIELD also,⁴ argues very vigorously against the accepted doctrine; but his argument begs the question, and proceeds upon the assumption that there is no evidence to support the belief in the manifestations of spiritualism: whereas it is beyond question that there is such evidence, however weak and unconvincing to the legal or the logical mind. The mistake of the learned judge is, that he applies the same test to all mankind that he would apply to himself; while it has been shown that regard must be had to the circumstances of the testator, his early training, his education, his means of enlightenment, and all the influences to which he has been exposed.

But although these beliefs are not *per se* insane delusions, they may, when taken in connection with other circumstances, amount to such.⁵ This is especially the case where the belief of the testator has acquired such a domi-

¹ *Gass v. Gass, supra. In re Keeler's Will*, 3 N. Y. S., 629.

² 21 Barb. (N. Y.), 107.

³ See *Lee v. Lee, supra*; *Kelly v. Miller*, 39 Miss., 17.

⁴ In his *American Cases on the Law of Wills*, 1st Ed., 384.

⁵ *Thompson v. Quimby, supra*; *Lee v. Lee, supra*; *Robinson v. Adams*, 62 Maine, 369.

nation over his mind that he is not left to the free and controlled exercise of his own will, at least so far as the belief is concerned.¹ It is not, however, a question of law but one of fact for the jury, under proper instruction. Such beliefs may also give rise to insane delusions in regard to the proper objects of the testator's bounty, in which case the ordinary rules of law apply; but the mere fact that the testator expresses a belief that his relatives,² or his daughters,³ or even his wife,⁴ are witches or bewitched, does not of itself prove such delusion in regard to them as will justify a court in setting aside his will.⁵ There can be no doubt, however, that in a clear case the courts would not hesitate to set a will aside on this ground.

In discussing the question of undue influence, we must again distinguish two classes of cases: First, those in which a spiritual adviser or professed medium has procured a benefit for himself or some third person, either by directly flattering or playing upon the preternatural beliefs of the testator, or merely by virtue of the general influence which belongs to him in consequence of the relation which he bears to the latter; and second, those in which the beliefs of the testator have so worked upon his mind, without the apparent active intervention of a spiritual advisor or medium, or, so to speak, the spirits seem to have so exercised their influence directly upon him, as to produce the will in question. The former class are on all fours with *Lyon v. Home*,⁷ discussed in a previous number of this magazine, and are decided upon analogous principles. "There are certain cases in which the law indulges in the presumption that undue influence has been used, and those cases are

¹ *Woodbury v. Obear*, 7 Gray (Mass.), 467; *Stanton v. Wetherwax*, 16 Barb. (N. Y.), 239.

² *Gass v. Gass*, *supra*; *William's Ex'r v. Williams*, 13 S. W. (Ky.), 2.

³ *Lee v. Lee*, *supra*.

⁴ *Addington v. Wilson*, 5 Ind., 137.

⁵ *Johnson v. Johnson*, 10 Ind., 387.

⁶ *Schildnecht v. Rompf*, 4 S. W., (Ky.), 235.

⁷ 6 L. R. Eq., 655.

⁸ Aug., 1892, Vol. 31, p. 505.

where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious advisor, or where other close confidential relationships exist. Such wills, when made to the exclusion of the natural objects of the testator's bounty, are viewed with great suspicion by the law, and some proof should be required beside the factum of the will before the will can be sustained."¹ In *Thompson v. Hawks*,² the defendant was a spirit medium, and the testator, who was very much interested in spiritualism, made frequent visits to her house, for the purpose of communicating with the spirits. She undertook to "develop" him, and enable him to communicate directly with the spirits of the dead. She did develop him with such success that she persuaded him to convey his real estate to her for a consideration of the payment of which there was no evidence except her own statement. About two years later she reconveyed this property to him, taking his notes in part payment; but in the interval between the two conveyances the testator had made his will, leaving her all his property, to the exclusion of his son, his only child. Both before and after the conveyance to Mrs. Hawks, and the execution of his will, the testator informed several persons that he had been directed by the spirit of his deceased wives, through Mrs. Hawks, to dispose of his property; that he had been advised by them that it was necessary for his development to do so; and that he had received various warnings against his son, and injunctions to "do well by" Mrs. Hawks, from the same source. The Court held that the will was clearly the result of undue influence, and therefore void. "The testator was in a weakened state of mind when he came under the influence of a spirit medium. He embraced spiritualism as practiced by the spirit medium, and instead of merely believing in it as an abstract proposition, he became possessed by it, and suffered it to dominate his life and override every other consideration. His

¹ *Marx v. McGlynn*, 88 N. Y., 357.
14 Fed. Rep., 902.

belief in it was artfully used by the spirit medium—the one, it appears, whom he ever consulted—to alienate him from his only son and child, and to get his property. The will made in such a mental condition and under such influences ought to be set aside.”

In *Baylies v. Spaulding*,¹ the testator was eighty years old at the time of his second marriage, which was to a woman who had been his housekeeper for over twelve years previous to the marriage. He was a believer in spiritualism; and his daughter's testimony went to show that she and her father had frequently consulted with Mrs. Blake (the second wife) before she came to be the testator's housekeeper; that the testator would go to sittings presided over by her, thinking that he had communications from his first wife; that Mrs. Blake had said that she would never marry the witness's father, but that after coming to live with him as housekeeper she obtained great influence over him; and that the day of his second marriage the testator sat down and cried and said that he did not want to be married. Other witnesses gave evidence tending to show that the second wife had great influence over the testator. It was claimed that in view of these facts, although the testator was admittedly a man of strong, clear mind and strong will, he was influenced to make his will by means of the communications which his second wife had obtained over him by her pretences that she was a medium and had communications from his first wife; and it was held that there was evidence from which the jury could reasonably infer that the alleged will was procured to be made through the undue influence and fraud of the second wife.

Of course, there are cases where a will is drawn in favor of a spiritual adviser, or a medium, and yet it will be allowed to stand. “The presumption of undue influence which arises in such cases is a presumption of fact. There is no statute which prohibits such a will. If fairly made the law does not condemn it.”² But in these, just as in

¹ 1 New Eng. Rep., 914.

² *Marx v. McGlynn*, *supra*.

the case of transfers of property made during life, the burden of proof is on the spiritual adviser or medium to show, not only that the transaction is wholly free from any suspicion of underhand dealing or exertion of undue influence on his part, but that it is also wholly unaffected by his relation to the testator; and if he cannot show this to a reasonable certainty, the will will be set aside. The mere fact of the belief of a testator in spiritualism, if that belief appears to have in any appreciable degree affected the provisions of the will, creates, just as in the case of any other religious belief, a presumption of the exercise of undue influence by the medium, and throws the burden of proof on him to rebut that presumption. It is true that it was held in *Figueira v. Taafe*,¹ by the Surrogate, following *in re Martin*,² that the mere fact that the legatee of a residuary estate, to the exclusion of the sisters of the testatrix, was the spiritual adviser of the latter, was not enough to establish undue influence, but that it must be affirmatively proved. The authority of this case is not very strong, however, when it is considered that it is not only opposed to the uniform current of decision in other courts, but is also at variance with the decision of the Court of Appeals of the same State in *Marx v. McGlynn*, *supra*.

The undue influence which will avoid a will, moreover, must be such as constrains the will of the testator and does not allow him to follow his own inclinations. The presumption of this constraint, therefore, vanishes when it can be shown, either that the testator did in fact follow his own wishes, or that the relation between the testator and the spiritual adviser was not such as to create a controlling influence. In *Lyons v. Campbell*³ the testatrix had made a will in 1862, bequeathing to Bishop Lay, who was then rector of the church in which she was a communicant, and his wife and children, over \$100,000. The bishop died the State shortly thereafter, and during an absence of

¹ 6 Dem. Sur., 166.

² 93 N. Y., 198.

³ 88 Ala., 462.

about twenty years did not visit her more than once. In 1884 she made another will, by which she cut these bequests down to \$40,000. Under these circumstances the Court very properly held that all presumption of improper influence was removed. *A fortiori* there can be no presumption of undue influence, where the legatee, although a priest of the religious body to which the testator belonged, is not shown to have ever had any religious conversations with him, or to have assumed any professional relation to him either before or after his conversion, or to have been in any way instrumental in effecting that conversion; for under such circumstances the priest cannot be said to have been the spiritual adviser of the testator, and therefore no presumption of undue influence can arise.¹

It is also an important question whether or not the will was drawn and executed under the supervision of the spiritual adviser; and this will explain most of the apparent inconsistencies in the decisions. Where the spiritual adviser draws up the will himself, or has it drawn up, and is present at its execution, the presumption of undue influence is, of course, strongest. But when the will is drawn up by another, at the direction of the testator, and executed in the absence of the spiritual adviser, the presumption is correspondingly weak; and in such cases it may well be held that some extraneous proof of undue influence is necessary in order to set aside the will.²

The rules laid down above in regard to a spiritual adviser would unquestionably apply to any one, not a professional religious adviser or medium, who procures for himself a testamentary provision by fostering or playing upon the superstitious fears or beliefs of another; with this qualification, that because the beneficiary does not hold a strictly professional or confidential relation to the testator, there can be no presumption of undue influence arising from that relation, but the case must depend upon the state of facts proven. In *Brooke v. Townsend*³ it was proved that

¹ *Bartholick's Will*, 5 N. Y. S., 842.

² See *Figueira v. Taafe*, *supra*; *Merrill v. Rolston*, 3 Redf. (N. Y.), 220.

³ 7 Gill., 10.

the testator was under the conviction that he had at various times had a sight of and conversation with the Almighty; that he had peculiar notions upon the subject of eternal punishment; and that he supposed himself directed in a supernatural manner to manumit his negroes, and labored under a religious delusion with respect to both them and his property. By his will he freed his negroes and left all his property to them. There was a very strong suspicion, if not amounting to a certainty, that the will was due to the superstitions of the testator, fostered by the negroes; and it was set aside.

The same rule would certainly apply to cases in which a third person had made use of the venality of the spiritual adviser or the medium to procure himself a benefit through the influence of the latter over the testator. It goes without saying that the moral character of the influence thus exerted would be no higher (if anything a little lower) than when the adviser or medium secures the benefit for himself. There is small need of argument to support the position. The feeling of the courts on the subject may be readily inferred from the language used in *Greenwood v. Cline*,¹ where there was "an evident attempt by means of these pretended spiritual communications to produce an improper impression upon the mind of the testatrix in regard to her son."

It is not necessary that there should be any proof or any suspicion of venality. It is enough if the influence of the spiritual adviser was strong enough to control the mind of the testator in the execution of the will. In *Carroll v. House*² the testator had been repeatedly urged by his sister to make a will; but he had always refused to do so, until on his death-bed. Then being told by the priest, who was his spiritual adviser, that it would be better for him to make one, or there would be litigation after his death, he yielded, and a testamentary paper was drawn up by the priest. By this he left all his property to his sister, to the

¹ 7 Or., 17.

² 22 Atl., 191.

exclusion of his grandchild, the daughter of his only child, his brother and his nephew. In this state of facts the Vice-Chancellor, VAN FLEET, very properly held that the will could not stand, but should be set aside on the ground of undue influence.¹

Again, it is not necessary that the benefit to be given should come from the will by the person who exerts the undue influence; it should be direct and immediate; it is enough if there be a likelihood of some remote and contingent benefit to accrue, provided that the contingency is not too remote. An example of such a contingent benefit would be a promise to the expectant legatee to a spiritual adviser or medium to whom he would reward him if he succeeded in obtaining a testamentary provision in his favor. But the probability of a future benefit may be much more remote; it may depend upon a presumption only. Just as the law creates a presumption of undue influence as attendant upon certain relations, so it will create in a proper case a presumption that the adviser will be probably benefited by the disposition.

¹ "It is clear that the paper under consideration is the product of undue influence. Left to himself, it is manifest that the decedent would have died intestate. He did not want to make a will. When he was first advised by his priest to make a will he refused, or deferred doing so until another time. But now he is told he is about to die; he believes he is in the grasp of death; he is also told that it will be better for him to make a will, and that if he does not litigation will follow his death. Those words come to him from his spiritual adviser; from the man in whom he had committed the welfare of his soul, and in whom he reposed the highest and holiest trust that it is possible for one human being to repose in another. Spoken by such a person, at such a time, they were invested with all the coercive force that words can ever have. To the decedent their force was irresistible. They not only subdued and broke his will, but put his recollection in a state of chaos. They made him forget his grandchild, his brother and his nephew. He said he had no relatives in this country except a sister. The words possessing the greatest force were false. The priest had no warrant whatever for declaring that if the decedent did not make a will there would be litigation after his death. No matter with what motive, or for what purpose this declaration was made, there can be no doubt that, though entirely false, it operated as a powerful appeal to the fears of the decedent, and counted as it was with the advice of his priest that it was better for him to make a will, that it constrained him to do what he did not want to do, what he would not have done if left to himself."

tion which he has advised, even where he is not shown to have controlled the will of the testator. Thus where a person holding the relation of spiritual adviser to the testator procures a will to be drawn, and supervises its execution, by which a church in which he is interested is benefited, that relation to the testator, reinforced by the relation in which he stands to the church, creates *vi ipso*, a presumption of undue influence which throws the burden of proof on him to show that the will is the result of the spontaneous volition of the testator.¹ The same holds good with respect to one not strictly a spiritual adviser. In *Drake's Appeal*² the testator, by a will made five days before his death, while he was suffering from a severe disease, left the bulk of his estate to a church in the town where he lived. This will was drawn by a vestryman of the church, who was also made sole executor, and who was the only one who ever conversed with him on the subject. This vestryman was deeply interested in the welfare of the church, and was a liberal contributor to its support. He, another vestryman, and his brother-in-law, were the three witnesses to the will, in which certain of the testator's relations were misdescribed. It was held that these circumstances were sufficient to create a suspicion of undue influence, which did not require direct proof, and threw the burden of explanation on the propounders of the will.

In the second class of cases, however, in which there is no presumption of undue influence arising from the relation of the legatee to the testator, it is the rule of the courts that such influence must be shown affirmatively; and that it is not enough to show that the will was in fact to some degree the offspring of the belief of the testator, or of the alleged communication of the spirits. The leading case on this branch of the subject is *Robinson v. Adams*,³ where there was no evidence of any attempt by any one to influence the mind of the testatrix, except the communications

¹ *Welsh's Will*, 1 Redf. (N. Y.), 238.

² 45 Conn., 9.

³ 62 Maine, 407.

from the spirits. The question of delusion was raised in this case also, and the two are not very clearly distinguished in the opinion. But the substance of the decision is, that while it is possible for one to come so under the influence of such communications as to lose one's own free will, yet they may be regarded by the testator as merely advice; that the same rule should be applied to such cases as to the suggestions of living beings, and that the true criterion is, whether these communications are considered by the testator as advice which he is at liberty to follow or not as he pleases, or as commands which he is bound to obey.¹

In Storey's Will,² there were no strong proofs to show that the belief of the testator in the pretended communications which were obtained for him from a spirit known

¹ " ' If she was of sound mind generally, and if no living person could unduly influence her, yet she may have been under the control and dictation of what she believed was the spirit of her deceased husband, communicating to her strictly through a medium ; and that to her it was a reality, and that her own will was subordinated to her husband's will, and that her will was his and not her's. It is contended that this was a delusion, and an undue and improper influence. On this point I give you the same rule as before stated. If she did thus believe, and if she did have what she deemed direct communications on the subject of this will, and implicitly followed them, yielding her own will and judgment and exercising no free agency (as before explained), then it would not be her will, but another's, in the same manner as if actually dictated by a living person. But if she did thus believe, and had what she deemed her husband's opinions, wishes or judgment, if she nevertheless acted her own will and her own judgment, as before explained, and did not abandon both to the supposed wishes and opinions of her husband, then it would not be undue influence, although she might have had full faith in the supposed communications, and have regarded them as her husband's advice. I give you the same rule, in short, as I gave you as to living persons.' There is no doubt that the law allows any person to seek advice, suggestions and opinions from others, where no fraud or deception is practised. The law does not limit the range. If a pious man of sound mind should seek advice by prayer, and should believe that he had a direct answer and should regard it, not as dictation, but advice entitled to consideration, would any one say that his will would be set aside as made under undue influence? . . . If they (the spirit communications) dictated the will, it was void. If they influenced the mind, but did not control it in making the will, or any part of it, then the will would not be by them invalidated on the ground of undue influence."

² 20 Ill. App., 183

"Little Squaw" had an influence upon him in making his will ; but the medium who procured him these communications was a sister of his wife, who was the principal legatee; and it was proved that when the will was taken to the testator's house to be signed, his wife said to him, "Now, Wilbur, sign this. You know what the little squaw has said about making provision for those you love best; and you know I love you, and you know you love me best ;" whereupon the testator took up a pen and signed the will. This should have been enough to set the Court on its guard; but the question of undue influence is barely touched upon in the opinion, and the will was upheld.

The general question was again thoroughly discussed in *Middleditch v. Williams*.¹ In that case the testator was at first a disbeliever in the pretensions of spiritualism ; and it was not until after having attended several seances, at the last of which the spirits gave what seemed to him convincing evidence of their power, that he became their votary. This was the printing, in brilliant letters, on a pin that his mother-in-law wore on her neck, the pet name of his dead wife. There was proof that he had stated to several persons that the spirit of his deceased wife had requested him, through a medium, to make provision in his will for his mother-in-law; and to another, that the spirit was constantly urging him to make a will in favor of her mother. The will did secure great advantages *in presenti* to the mother, and greater contingent advantages to her son, to the serious disadvantage of the only daughter of the testator. But the will was held valid, on the ground that there was not sufficient competent evidence before the Court to prove undue influence.²

¹ 45 N. J. Eq., 726.

² There was evidence of very improper and suspicious conduct by the mother-in-law towards the relatives of the testator on the day of the wife's funeral ; and at the time of the testator's death. She not only did not send notice of his death to them, but did all she could to conceal it from them. The decision of the Vice-Ordinary is very strongly attacked by Mr. George H. Yeaman, in the Alb. L. J., vol. 40, p. 384. He admits the truth of the principles on which the decision rests, but condemns the

The true basis of the decision is that under the law New Jersey the declarations of a testator that he has been unduly influenced in making his will are not receivable to impeach it; and these declarations were the only direct evidence of undue influence in the case. But the rule is a questionable one in some respects; in the case in hand it led to a manifestly unjust result; and such evidence is received by other courts.¹ But even without that there would seem to have been enough suspicious circumstances to have justified the Court in setting aside the will; in particular the fact that the spirits convinced the testator through the mother-in-law's pin; and the injustice of a will is held to aid in creating a presumption of undue influence.²

The question whether the influence of the spirits is, *se* undue has never yet been raised independently of other considerations. It is true that it was held in *Newton v. Carbery*,³ that the general doctrines of a church are not undue influence sufficient to avoid a will; and there is a dictum in *Brown v. Ward*⁴ to the effect that the supposition

result deduced from them, and argues that not enough weight was given to the other considerations in the case, nor to the plain facts. "Law seeking to ascertain facts, for the purpose of basing judgments on the facts, must keep within the domain of verifiable human knowledge. Here the leading fact, well enough established, is that the testator believed in spiritualism and made his will under what he supposed a communication from the spirit of his dead wife. The mildest thing that can be said of spiritualism is that it is not known to be true, and cannot be proved to be true. Therefore a will that comes into Court out of the spiritual world does not come with the verifiable safe-guards required by law. . . . The real question is, not whether spiritualism is true or whether believing in it is an insane delusion. It is whether a will made under its influence is a real will, or a safe thing for the world as we know it. . . . Is spiritualism, in any view of it, a part of the practical realities of this life, as we know them; a basis for ethics, for family elements, for testamentary dispositions? Does not the question remain heretofore, was it his will? If the testator says that he was thus influenced, what more do we want? If he was mistaken in thinking his will was dictated by the spirit of his dead wife, not to say defrauded into so believing, ought it not to be rejected? And if *in fact dictated by her*, ought it not equally to be rejected? It was not his will."

¹ *Thompson v. Hawks*, *supra*.

² *In re Blair's Will*, 16 N. Y. Suppl., 874.

³ 5 Cranch C. Ct., 626.

⁴ 53 Md., 375.

directions of her ancestors, given to a woman who is a firm believer in spiritualism, do not constitute undue influence, though the question was not raised or discussed by counsel. But it is doubtful whether the spiritualists can be properly classed as a "church," and whether the dictum aforesaid is correct. The nature of the influence of the spirits has never been fully investigated by the courts. It has been either tacitly or expressly assumed that it is in all respects similar to that of human beings, to be treated by the same rules and regarded as mere advice, or as undue influence, according to the relation of the medium to the testator, or the benefit derived; that where the medium did not appear to have used his power for his own emolument, or that of any other person, the influence must be held proper, unless it could be proved to have controlled the mind of the testator. This seems to rest on a misapprehension. The presumption of undue influence is created by the law for the benefit of the heir, the expectant object of the testator's bounty, not to punish the one who exerts the improper influence. If a testator were to die without heirs, and there would consequently be no one who could show a present interest in having the will set aside, there would be no cause for setting it aside, no matter what the influence brought to bear upon the testator. Even if the State were to set up a claim of *escheat*, it would not be entertained. Therefore, since, as was said, an unnatural or unjust will is an indication of undue influence,¹ and the interest of the heir, not the rebuking of the improper influence, is the basis of the action of the Court, there would seem to be no valid reason for making any distinction between influences which alike tend to affect that interest injuriously—no reason for holding that a minister who procures a legacy for a church in which he is interested should be held to have exercised undue influence, but the medium, or the spirit, if you choose, who has been the cause of a testamentary disposition in favor of any person or institution, to the injury of

¹ Blair's Will, *supra*.

the heir's expectations, should be considered as having exerted a legal influence. Where the results are alike, the influences should be considered as falling under the same ban.

Again, the point urged in some cases, that there is no reason to suppose that the testator looked upon the communications of the spirits as simply advice, which he was at liberty to follow or not as he pleased, is flatly contradicted by the whole experience of mankind. There may be some rare cases where a man or woman, while firmly believing in the doctrines and phenomena of spiritualism, at the same time refuses to grant them more than a mental belief, and retains complete dominion over his own will and judgment;¹ but in the vast majority of cases this belief acquires such control over the mind of its votaries as to make them its servants, if not its slaves. The same is true of most religious beliefs, whether orthodox or not; and the only reason for countenancing wills made under the influence of such beliefs is the general propriety of their provisions. An influence which leads to proper results certainly cannot be called undue. But it is a distinguishing mark of wills induced by a belief in spiritualism that their provisions are not in accord with our ideas of propriety. It is claimed therefore, that where the ideas of the spirits clash with ours, those of the spirits should be set aside.²

¹ As seems to have been the case in Smith's will, *supra*.

² Judge Redfield, in the work cited above, presents this phase of the argument against spirit influence with great force: "The believers in such revelations commonly, if not always, feel themselves entirely incapable of going counter to their dictation. In this respect they are in exactly the position of the insane, who believe themselves under the influence of spirits. They become, either willingly or unwillingly, commonly the former, the complete slaves of such influence. Can it, then, fairly be submitted to an ordinary jury to find whether souls, still bound by terrestrial influences, will be capable of weighing with discretion and impartiality the exact deference to be justly given to the messages from the heavenly world? The law, which has no capacity and no instruments or machinery for dealing with such subjects, except in a common-sense and practical manner, is compelled to judge, by the fruits of the nature and source of the influence. We are assured by a high authority that a good tree cannot bring forth evil fruit, neither can

There remains still the question, which does not appear to have been raised separately in any of the reported cases, whether, granting, for the sake of the argument, that these influences are proper and fit for a court of justice to recognize and exercise no undue domination over the mind of a testator which interferes with his free will, they are not, nevertheless, to be treated as a fraud upon him, and whether a will executed under their influence should not be set aside as not the will of the testator. There can be no question that a will procured by false pretences would be set aside, just as certainly as a conveyance during life procured by the same means; and if it can be shown that these pretended spiritual communications and manifestations are false and fraudulent, a will which is induced by them should certainly be set aside also. It is a very strong argument in favor of this view that there is no positive or even presumptive evidence of the truth of the claims of spiritualism. Evidence enough there is of a certain kind; but that by no means convincing to a mind accustomed to scientific methods of investigation. Then, on the other hand, the precautions taken by the mediums to have their seances as secret as possible; the pains they take to elude all investigation; the fact that most, if not all, of their performances can be duplicated and even improved upon by those who disclaim all preternatural powers and depend for their success simply upon their dexterity and sleight of hand; and the fact (proved by the almost daily exposures of the frauds practised by spiritualists) that the spirits, whenever we can get hold of them, are flesh and blood as we are, and pass current among us for ordinary men and women; all point with tremendous force, strong almost to the point of absolute conviction, to the conclusion that all these pretensions are in reality nothing but frauds, and should be treated as such.

corrupt tree bring forth good fruit. We must conclude, therefore, that an influence proceeding from a good being cannot produce a bad will; that it must be an evil influence—what the law denominates an undue influence—to produce such a result. It is impossible that a good spirit, by any direct agency or influence, should be the author of evil."

And when we add to this the other fact that there is not a reported case in the annals of criminal law in which such pretences have not been held to be either a fraud or a false pretence,¹ there would seem to be but little room for doubt that, in the eye of the law at least, all these pretences are, or should be regarded as being false and a fraud on those who suffer themselves to be deluded into believing them and acting on that belief. It is difficult to understand why the civil courts should hold a different doctrine on this point from that which is held in the criminal courts, especially as the latter should be, if anything, the more lenient in their treatment of these matters. The fact that a different view is taken by the two branches of the judiciary is an anomaly, and one that ought to be corrected; and the only proper way to correct it, in the present light that we have on the subject, is for the civil courts to adopt the plain and common-sense rule of the criminal courts and to hold that all such claims to the possession and exercise of preternatural power are false, and that a will that owes its execution to a belief superinduced by these pretences is procured by the practice of fraud upon the testator, is, therefore, not his will and should be set aside. There is no valid objection to be urged against the adoption of such a rule, and it would remove most of the difficulties that now beset this particular branch of the law, facilitate the dealing out of justice to those who are defrauded of their just expectations by such means, and reduce the chances of doing injustice to a minimum, since the facts show that, as far as our present knowledge goes, the probability of the truth of these pretences is infinitesimal.

The results of the preceding discussion may be summarized thus: (1) A belief in spiritualism or in any other form of the preternatural is not *per se* an insane delusion; but it may be one of the evidences of delusion, or may, by the ascendancy it acquires over the mind of the testator, become or give rise to delusion eventually. (2) That where any person, whether a spiritual adviser, a professed medium,

¹ 14 Crim. L. Mag., 1.

or one who merely fosters or plays upon the superstition of the testator, while not standing in any confidential relation to him, procures a testamentary provision for himself or another person, through the influence of the testator's belief, or the relation in which he stands to him, the will will be set aside on the ground of undue influence. (3) That where the person benefited, or the one who induces the execution of the will, is a spiritual adviser or medium, undue influence will be presumed from the relation in which he stands to the testator; but where such confidential relation does not exist, undue influence will not be presumed, but must be affirmatively proved. (4) That it seems to be the doctrine of the courts that the influence of preternatural beliefs or of alleged spiritual communications, considered alone, is not *per se* an undue influence; but (5) That on the other hand there seem to be very strong grounds for holding that it is such an influence, so far at least as spiritualism is concerned, and that, therefore, no will that has for its inducement spiritualistic communications can be held to be the will of the testator. (6) That apart from the question of delusion or undue influence there are good reasons for holding, in analogy to criminal law, that all alleged spiritualistic communications and phenomena are false and fraudulent, and that a will induced by them is procured by fraud, and, therefore, is not the will of the testator. It is claimed in conclusion that the above considerations will be sufficient to set aside any will induced by preternatural beliefs that works injustice to the natural and expectant objects of a testator's bounty, and will do no injustice to any one; while the rule adopted in some of the cases cited above has resulted in manifest injustice, even to the perception of the Court which, albeit reluctantly, felt itself called called upon by technical rules to decide as it did.

THE BEHRING SEA CONTROVERSY.¹

BY HENRY FLANDERS, ESQ.

THE sea and the air are the common property of mankind. They are universal elements, and generally are incapable of appropriation. Nevertheless, particular portions of the sea, by the approved usage of nations—which is the only recognized basis of international law—may become the subjects of exclusive proprietary right. Those particular portions of the sea which constitute the maritime territory of States are, as stated by authoritative writers on the law of nations, as follows :

(1) Ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state.

(2) The sea along the coasts of a state as far as a cannon-shot will reach from the shore. This formerly was usually spoken of as a marine league, that being considered the extreme range of artillery. But the improvements in ordnance have been so great in recent years that the range has been doubled, and the limit of dominion thereby equally enlarged.

(3) Straits and sounds bounded on both sides of the territory of the same state, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another.

As to the last head, it should be observed, that a state thus situated with respect to straits which connect seas whose navigation is free to all the world cannot exclude other states from their use, inasmuch as they possess the right to communicate with each other.² In other words they are jurisdictional waters, but the jurisdiction is not

¹ This statement of the case by Mr. FLANDERS will be followed in succeeding numbers of the AMERICAN LAW REGISTER AND REVIEW by papers presenting the case from the respective points of view of Great Britain and the United States.

² Wheaton's International Law (Boyd's Ed.), p. 251.

exclusive. The law of nations operates concurrently with the territorial law and admits the right of passage.

It should also be observed, that while the maritime territory of a state includes, generally speaking, the waters of gulfs and bays which indent its coasts, yet this observation must be limited by reference to the width of these waters at their mouths. In other words, the claim to territorial right does not include all portions of all gulfs and bays—gulfs and bays of great extent being assimilated to the open sea. ORTOLAN lays down the rule as follows:¹ "We should range upon the same line as ports and roads, gulfs and bays and all indentations known by other names, when these indentations made by the lands of the same state do not extend in breadth the double range of cannon, or when the entrance can be governed by artillery, or when it is naturally defended by islands, banks or rocks. In all these cases we can truly say that these gulfs or these bays are in the power of the nation which is the mistress of the territory surrounding them. This state is in possession; all the reasons which apply to ports and roads can be repeated here."

Delaware Bay and waters of like character would, obviously, fall within ORTOLAN'S rule, and Behring's Sea without it, unless, indeed, Russia had such a peculiar possession of that sea as to exclude other states from its common use. That is to say, she may possibly have had such an exclusive possession, with the tacit consent of other nations, as to give her an instituted right, and which right passed to the United States when she purchased the adjacent territory.

In the *Twee Gebroeders*,² Lord STOWELL, while stating the general principle that in the sea, out of the reach of cannon-shot, universal use is presumed, yet held that portions of the sea are prescribed for. Nevertheless, the general presumption, he said, bears strongly against such exclusive rights, and the title is a matter to be established

¹ *Diplomatie de la Mer*, vol. i., p. 145.

² 3 Rob., 339.

on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence.

If portions of the sea may be prescribed for, particularly seas, it should seem, may equally be prescribed for. But the title in the one case, as in the other, must be proved by the same undoubted evidence.

The question then, is, whether there ever was such an exclusive possession of the Behring Sea by Russia, and with the tacit consent of other nations, as to give her proprietorship and dominion.

The question arises, and concerns chiefly Great Britain and the United States; the situation of their territory on the North American continent and their rights of navigation being involved in it, and demanding their action with respect to it.

In 1821 the Russian government, by an imperial ukase prohibited all foreign vessels from approaching within 10 Italian miles of the coasts and islands then belonging to Russia in Behring Sea. This ukase was, doubtless, in the interest and at the instigation of the Russian-American Fur Company, a powerful corporation, originally chartered by the Emperor PAUL in 1799, and, by subsequent renewal of its charter, continuing to exist until 1862. The prohibition of the ukase was manifestly against common right. "We can say with assurance," says ORTOLAN, "that the open sea is not susceptible of being the property of man because the open sea cannot be possessed. . . . The impossibility of property in the seas results from the physical nature of this element, which cannot be possessed and which serves as the essential means of communication between men. The impossibility of empire over the sea results from the equality of rights and the reciprocal independence of nations."

Surely, Russia had no inherent right to take partial possession of 100 miles of the sea, and prohibit the vessels of all nations from navigating the same, or even from approaching within that distance of her coasts and

islands! If she had, then it must be conceded that she alone had the right of taking fish, seal and other products of the sea within the line of waters described by the ukase, and also that the United States, in purchasing her title, acquired all the rights appertaining to it. But having no inherent right to 100 miles of the sea off her coasts and islands, was her claim made valid by the assent and acquiescence of other nations? What nation has, ever by assent and acquiescence, admitted such claim, or expressly or by implication consented to it? By the convention of February 29, 1892, Great Britain and the United States have agreed to submit to arbitration these questions:—

(1) What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

(2) How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

(3) Was the body of water now known as the Behring's Sea included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

(4) Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring's Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

(5) Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?

The first question relates to the exclusive jurisdiction and rights asserted and exercised by Russia in the Behring Sea prior and up to the time of the cession of Alaska to the United States. Claiming a right does not substantiate it. And hence the second question goes to the point whether Great Britain ever recognized and conceded such claim.

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This is a crucial inquiry, and Great Britain maintains and will maintain before the arbitrators, that she never did the one or the other. She insists that directly after the ukase of 1821 the Russian government was warned that Great Britain did not, and would not, recognize the pretensions set up in that paper. When ambassador at Verona, in 1822, the Duke of WELLINGTON, in a note to Count NESSEBRODE, stated the position of his government as follows: "We cannot admit the right of any power possessing the sovereignty of a country to exclude the vessels of other nations from the seas on its coasts to the distance of 100 Italian miles."

The government of the United States, on the other hand, contends that the protests of Great Britain, embodied in the note of the Duke of WELLINGTON, above quoted, and in a subsequent note to Count LIEVEN, had reference to the territory south of the Alaskan peninsulas bordering on the Pacific, and not at all to the Behring Sea. Moreover, the United States further contends, that the treaty of 1821 between Great Britain and Russia, did not relate to the Behring Sea. The article of that treaty germane to the subject is as follows:—

"ARTICLE I. It is agreed that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles."

While admitting that the words "Pacific Ocean," in a certain sense, include Behring Sea, just as the words "Atlantic Ocean" include the Gulf of Mexico, the government of the United States insists, that although in a grammatical sense Behring Sea belongs to the waters of the Pacific Ocean, it is not technically a part of that ocean, any more than the Gulf of Mexico or the English Channel would, in common parlance, and according to the usage of the world.

be considered as included in the Atlantic Ocean. Besides, on higher ground, the United States maintains, that in a case of "proved necessity" they may go beyond the three-mile limit, and assert their sovereignty over the land and waters of Alaska. Great Britain joins issue upon all these points. She asserts, that so far as diplomatic representation went, she took every step which it was in her power to take "in order to make it clear to the Russian government that Great Britain did not accept the claim to exclude her subjects for 100 miles' distance from the coast, which had been put forward in the ukase of 1821."

And he further asserts that the United States through Mr. ADAMS, Secretary of State under Mr. MONROE, took the same ground, and explicitly refused to recognize or to be bound by the pretensions of the Russian ukase. His words, addressed to the Russian Chancellorie in 1825, are as follows: "The pretensions of the Russian (Imperial) Government extend to an exclusive territorial jurisdiction from the 45th degree of North latitude on the Asiatic coast to the latitude of 51 North on the West coast of the American Continent, and they assume the right of interdicting the navigation and the fishing of all other nations to the extent of one hundred miles from the whole of the coast. The United States can admit no part of these claims."

Hence the contention of Great Britain is that the United States are now estopped to set up the Russian claim to territorial jurisdiction over Behring Sea, as part of her title, when she repudiated that claim and refused to be bound by it when Alaska belonged to Russia.

Moreover, she declares that the Treaty of 1825, the first article of which we have already quoted, "was intended to negative the extravagant claim that had recently been made on the part of Russia," and, in point of fact, did, by express stipulation, secure its renunciation. Great Britain, however, denies, even if the phrase "Pacific Ocean," used in the treaty of 1825, did not include Behring Sea, that her inherent rights to free passage and free fishing over a

¹ Lord SALISBURY'S Dispatch of February 21, 1891.

vast extent of ocean would be effectively renounced by mere reticence or omission. "The right," says Lord SALISBURY, "is one of which we would not be deprived unless we consented to abandon it, and that consent could not be sufficiently inferred from our negotiations having omitted to mention the subject upon one particular occasion."¹

Nevertheless, Great Britain insists that Behring Sea was included in the term "Pacific Ocean" as used in the Treaty of 1825, and was intended to be so included; that it is as much a part of the Pacific Ocean as the Bay of Biscay is a part of the Atlantic Ocean; that giving a separate designation to a part of the ocean does not exclude it from the general designation, and that the term for the whole includes all the parts.

"If, then," says Lord SALISBURY, "in ordinary language, the Pacific Ocean is used as a phrase including the whole sea from Behring Straits to the Antarctic Circle, it follows that the 1st article of the treaty of 1825 did secure to Great Britain in the fullest manner the freedom of navigation and fishing in Behring Sea. In that case no inference, however indirect or circuitous, can be drawn from any omission in the language of that instrument to show that Great Britain acquiesced in the usurpation which the ukase of 1821 had attempted. The other documents which I have quoted sufficiently establish that she not only did not acquiesce in it, but repudiated it more than once in plain and unequivocal terms; and as the claim made by the ukase has no strength or validity except what it might derive from the assent of any power whom it might affect, it results that Russia has never acquired by the ukase any right to curtail the natural liberty of Her Majesty's subjects to navigate or fish in these seas anywhere outside territorial waters. And what Russia did not herself possess she was not able to transmit to the United States.

"Her Majesty's Government have, in view of these considerations, no doubt whatever that British subjects enjoy the same rights in Behring Sea which belong to them in every other portion of the open ocean."

¹ Dispatch of February 21, 1891.

It will be observed that the questions between the two governments are of such a character, and their imperative claims are so sharply opposed, that in the ordinary course of things one or the other must give way and abandon its pretensions, or war must needs result. Happily, they are to be determined by arbitration, and each government will have an opportunity to show by documentary evidence how much or how little it has encouraged or resisted the claim put forward by Russia in the ukase of 1821, to an exclusive jurisdiction of Behring Sea. If that jurisdiction should be sustained by the arbitration, then the question follows whether that jurisdiction, and the rights growing out of it, in respect to the seal fisheries, did not pass unimpaired to the United States, by the purchase of Alaska, in 1867?

The fifth and last question to be submitted to the arbitration is one of great interest and serious import. It is, whether the United States has any right, and, if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit? Great Britain admits that seals landing on the islands and the shores of the mainland, or found in the waters within cannon shot of the coast, cannot lawfully be captured by her subjects; not, perhaps, because they are, in a strict sense, the property of the United States, but because the citizens or subjects of other nations cannot invade her jurisdiction for the purpose of such captures. But she maintains that on their way to and from the islands and shores, outside the three mile limit, they may be taken by anybody, the same as salmon or cod, or any other product of the sea.

With respect to the general right of fishing, the two governments have held very different positions. The government of the United States has hitherto asserted that her fishermen may lawfully proceed within the bays, gulfs and coves that indent the coasts of the British Provinces, provided the headlands are more than six miles apart, and provided also they keep more than three miles from the shore. The

British government, on the contrary, has asserted her exclusive jurisdiction to all within the headlands, no matter how far apart they may be.

If the American claim as to the fisheries in general is applicable to the seal fisheries as well, then the present contention of the United States, apart from its claim arising from the Russian title, is inconsistent and embarrassing. But we cannot help thinking that the seal fisheries stand upon a different footing, and can be supported upon higher grounds. The right of protection or property in these seal fisheries must appeal strongly to the common instincts of justice and humanity. The ground upon which that right is based is thus generally stated by Mr. BLAINE:

"The Government of the United States holds that the ownership of the islands upon which the seals breed, the habit of the seals in regularly resorting thither and rearing their young thereon, that their going out from the islands in search of food and regularly returning thereon, and all the facts and incidents of their relation to the islands give to the United States a property interest therein; that this property interest was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska; that England recognized this property interest so far as recognition is implied by abstaining from all interference with it during the whole period of Russian ownership of Alaska, and during the first nineteen years of the sovereignty of the United States. It is yet to be determined whether the lawless intrusion of Canadian vessels in 1886 and subsequent years has changed the law and equity of the case theretofore prevailing."¹

¹ Mr. BLAINE to Sir JULIAN PAUNCEFORTE, April 14, 1891.

SUPREME COURT OF MINNESOTA.

SPARROW v. POND (POND, Intervener).

SYLLABUS.

Growing Crops—Liability to Execution—"Fructus Industriales" and "Fructus Naturales"—Blackberries.

At common law those products of the earth which are annual, are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed "emblems," and sometimes "*fructus industriales*," including grain, garden vegetables and the like, are, even while still annexed to the soil, treated as chattels, and may be attached or taken in execution.

On the other hand, the fruit of trees, perennial bushes and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," are, while still unsevered from the soil, considered as pertaining to the realty, and are not subject to attachment or execution apart from it.

The proper test by which to distinguish between "*fructus industriales*" and "*fructus naturales*" is whether the subject matter will bear successive crops for years, thus permanently enhancing the value of the land, or will produce a single crop only, which will be the sole return for the labor expended.

Blackberry bushes are perennial, and when once planted yield successive crops. Blackberries, therefore, are "*fructus naturales*," and, while growing on the bushes, are not subject to levy and sale on execution as personal property.

The facts are sufficiently stated in the opinion of the Court.

S. T. Littleton, for appellant. Samuel Lord and Robert Taylor, for respondent.

OPINION OF THE COURT.

MITCHELL, J. At common law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed "emblems," and sometimes "*fructus industriales*," were, even while still annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death. This class included grain,

garden vegetables and the like. On the other hand, the fruit of the trees, perennial bushes and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life.¹ A possible exception to this classification is the case of hops on the vines, which have been held to be personal chattels, and subject to sale as such. The ground upon which this seems to be held is that, although the roots of hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. The decisions upon that question, however, seem to be all based upon the old case of *Latham v. Atwood*.² It is sometimes stated that the test whether an unsevered product of the soil is an emblement, and, as such, personal property, is whether it is produced chiefly by the manurance and industry of the owner. But, while this test is correct as far as it goes, it is incomplete. Under modern improved methods, all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes or vines; but it has never been held that fruit growing upon cultivated trees was subject to levy as personal property. No doubt all emblements are produced by the manurance and labor of the owner, and are called "*fructus industriales*" for that reason; but the manner, as well as purpose of planting, is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblements." On the other hand, if the tree, bush or vine is one which requires to be planted but

¹ 4 Kent, Comm.; 4 Bac. Abr. 372, tit. "Emblements; Freem. Ex'ns, § 113; 1 Schouler, Pers. Prop., § 100 *et seq.*; *State v. Gemmill*, 1 Houst. (Del.), 9; *Craddock v. Riddlesbarger*, 2 Dana, 205; 9 Amer. & Eng. Enc. Law, tit. "Crops;" *Rodwell v. Phillips*, 9 Mees. & W., 501.

² Cro. Car. 515. See *Frank v. Harrington*, 36 Barb., 415.

once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among "*fructus naturales*," and the right of emblements would not attach.¹ This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts (unless hops be an exception), and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and when planted once yield successive crops. They grow wild, but like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree. It seems to us quite clear that at common law such berries, while growing upon the bushes were not subject to levy on execution as personal property, and we have no statute changing the rule. Evidently the main purpose of section 315, c. 66, Gen. St., was, while permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested. The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblements," and neither of them included fruits of perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the statute as to the kinds of products of the earth which may be levied on, while still attached to the soil is, perhaps, to include perennial grasses. As we are of opinion that these berries, while growing on the bushes, were not subject to levy as personal property, it becomes unnecessary to consider any other question in the case. To prevent misapprehension hereafter, it may be well, however, to say, with reference to the ques-

¹ Darlington, Pers. Prop., 26.

tion whether crops growing upon a homestead under statutes of the State are subject to levy, or whether the seizure would be an interference with the beneficial use and control of the homestead by the debtor, that it is determined, as counsel for appellant assume, by the case *Erickson v. Patterson*.¹ In that case the grain grew upon land entered under the United States Homestead Law, the provisions of which the land was not liable for debts contracted prior to the issuing of the patent, the exemption not being at all dependent upon occupancy and user as a home. Hence that case would not necessarily control the question discussed in the present case. Judgment affirmed.

LEVY ON GROWING CROPS.

I.—Although, as a general rule, growing crops are a part of the land to which they are attached (*Preston v. Ryan*, 45 Mich., 174), and, if belonging to the owner of the land, will pass by a sale of it, either voluntary or under execution, unless specially reserved: *Terhune v. Elbersson*, 2 Pa., 726; *Bear v. Bitzer*, 16 Pa., 175; *Hendrickson v. Ivins*, Saxton, 522; *Bloom v. Welsh*, 3 Dutch., 177; *Foote v. Colvin*, 3 Johns., 222; *Austin v. Sawyer*, 9 Cowen, 40; *Pattison v. Hull*, 9 Cowen, 754; *Gillett v. Balcom*, 6 Barb. (N. Y.), 370; *Crews v. Pendleton*, 1 Leigh (Va.), 297; *Pitts v. Hendrix*, 6 Ga., 452; *Jones v. Thomas*, 8 Blackf. (Ind.), 428; *Floyd v. Ricks*, 14 Ark., 286; *Rankin v. Kinsey*, 7 Ill. App., 215; *Dail v. Freeman*, 92 N. C., 351. Contra, *Houts v. Showalter*, 10 Ohio St., 124, yet, if they are such as are produced by annual labor and cultivation, they are to be regarded and treated in most respects as personal chattels. As such, they may be conveyed by parol, go to the executor or ad-

ministrator instead of to the heir, and may be levied upon and sold under execution: 4 Bac. Abr. Ex. and Adms. (H.) 1, Bouvier's (1844), p. 83; *Brittain v. McKay*, 100 N. C. L., 265; *Westbrook v. Eager*, 1 Harrison (16 N. J. L.), 2; *Kimball v. Sattley*, 55 Vt., 2. Such crops are known as *fructus industriales*, to distinguish them from the perennial products of the earth, such as timber, grass and fruits of trees, which are called *fructus naturales*, and are considered and treated as part of the realty, until severed from it in fact or in law. They are also termed law emblements, and, properly speaking, include only the products of sown land; but the name has been extended not only to growing crops of corn and grain, but also to roots planted and other annual artificial profits: *Smith v. Tritton*, 28 Am. Dec., 565. There was formerly a widely-spread idea, however, that even *fructus industriales*, while still growing and deriving nutriment from the soil, were to

¹ 50 N. W. Rep. (Minn.), 699.

regarded as part of the realty so far as their seizure in execution was concerned, and that they became stamped with the character of personality for all purposes only when ripe, and, therefore, no longer intimately connected with the land, but ready to be severed from it. In other words, that their personal nature depended upon an implied severance, due to the fact of maturity. This view is strongly hinted at in some comparatively late cases: *Warwick v. Bruce*, 2 M. & S., 205; *Parker v. Staniland*, 11 East, 362; *Heard v. Fairbanks*, 5 Metc. (Mass.), 111; *Mulligan v. Newton*, 16 Gray (Mass.), 211. But this doctrine was too whimsical to survive the application of modern practical legal principles; and it is now firmly established that annual crops, raised by yearly labor and cultivation, are to be regarded as personal chattels, independent of and distinct from the land, without regard to whether they are still growing or have matured and ceased to derive any nutriment from the soil: *Garth v. Caldwell*, 72 Mo., 622.

II.—Among *fructus industriales*, and, therefore, liable to be taken in execution, have been classed grain of all kinds, wheat, rye, oats and corn, and presumably rice, barley and buckwheat: *Poole's case*, 1 Salk., 368; *Peacock v. Purvis*, 2 Brod. & Bing., 362; *Austin v. Sawyer*, 9 Cowen, 39; *Green v. Armstrong*, 1 Den., 550; *Shepard v. Philbrick*, 2 Den., 174; *Whipple v. Foot*, 2 Johns., 418; S. C., 3 Am. Dec., 442; *Stewart v. Doughty*, 9 Johns., 108; *Hartwell v. Bissell*, 17 Johns., 128; *Stambaugh v. Yeates*, 2 Rawle, 161; *Backenstoss v. Stahler*, 33 Pa., 251; *Hershey v. Metzgar*, 90 Pa., 217; *Long v. Seavers*,

103 Pa., 517; *Westbrook v. Eager*, *supra*; *Penhallow v. Dwight*, 7 Mass., 34; S. C. 5 Am. Dec., 21; *Heard v. Fairbanks*, *supra*; *Mulligan v. Newton*, *supra*; *Smith v. Tritt*, *supra*; *Carson v. Browden*, 2 Lea (Tenn.), 701; *Erickson v. Patterson*, 50 N. W. Rep., 699; cotton: *McKenzie v. Lampley*, 31 Ala., 526; *Devore v. Kemp*, 3 Hill (S. C.), 259; pease, beans, tares, hemp, flax, saffron: 1 Washb. Real Pr., 102; *Coombs v. Jordan*, 3 Bland. Ch. on p. 312, S. C. 22 Am. Dec., 286; cabbage: *Ross v. Welch*, 11 Gray, 77 Mass., 235; *Mulligan v. Newton*, *supra*; broom corn: *Bowman v. Com.*, 8 Ind., 58; tobacco: *Coombs v. Jordan*, *supra*; melons: 4 Bac. Abr., p. 83, Exrs. and Admrs. (H.), 1; 1 Washb. Real Pr., 102, and, in general, all vegetables: *Backenstoss v. Stahler*, *supra*. All annual roots, also, such as potatoes: *Warwick v. Bruce*, 2 M. and S., 205; *Parker v. Staniland*, 11 East, 362; *Evans v. Roberts*, 5 B. and C., 828; *Jones v. Flint*, 10 Ad. and El., 753; *Sainsbury v. Matthews*, 4 M. and W., 343; *Heard v. Fairbanks*, *supra*; *Mulligan v. Newton*, *supra*; carrots: *Coombs v. Jordan*, *supra*; parsnips: 4 Bac. Abr., *supra*; 9 Vin. Abr., 371, pl. 70, and turnips, *Dunne v. Ferguson*, *Hayes*, 546, although they go to the heir, and not to the executor, according to *Bacon and Viner* in the passages cited, on account of a fancied injury to be done to the inheritance by digging them, may, nevertheless, be now taken in execution as personal chattels, notwithstanding the decision in *Emerson v. Heelis*, 2 Taunt., 38, that turnips were *fructus naturales*. In short, all crops of a purely annual nature, including even sugar-cane and pep-

permint, are personal chattels, and may be taken in execution.

Among *fructus naturales* have been classed growing or standing timber (4 Bac. Abr., *supra*; Green v. Armstrong, 1 Den., 550; Slocum v. Seymour, 36 N. J. L., 138; Putney v. Day, 6 N. H., 430; Olmstead v. Niles, 7 N. H., 522; Wilson v. Douglas, 10 W. N. C., 527), growing underwood, (Scorell v. Boxall, 1 Younge & J., 396), fruit trees (Adams v. Smith, Breese, 221), and the fruit thereon, such as apples, pears, cherries, quinces, plums, apricots, peaches, and presumably oranges, lemons, bananas, etc.; Rodwell v. Phillips, 9 M. & W., 501; Craddock v. Riddlesbarger, 2 Dana (Ky.), 205; Roe v. Gemmill, 1 Houst. (Del.), 9, growing grass; (Crosby v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 M. & W., 248; Norris v. Watson, 22 N. H., 364; S. C., 55 Am., Dec., 160), and nuts of all kinds, chestnuts, shellbarks, almonds, walnuts, and the like (Anon., Freem. Ch., 210). With these, according to Sparrow v. Pond (Minn.), 52 N. W. Rep., 36, (the principal case), should be included blackberries, and by analogy all berries, as raspberries and strawberries, and also gooseberries, currants and grapes, which are the annual produce of perennial roots or plants. There has been some difference of opinion in regard to plants which are not strictly of either annual or perennial nature, but which have to be replaced after a limited number of years, of which clover is perhaps the most widely known example. In Williams on Executors, 454, it is suggested that these, because of the greater care and labor necessary for their production, were to be classed with *fructus indus-*

triales; but this view was rejected so far at least as clover was concerned, in Evans v. Iglehart, 6 Gr. & J., 171, on the ground that, conceding that it was not a perennial grass, "neither is it a grass of one year only, nor the subject of cultivation after it is sown." With regard to the purely annual grasses such as sainfoin, and the so-called Hungarian grass (which is really grain), there can be no doubt that they are to be considered, like any other annual crop, as *fructus industriales*, and therefore liable to levy and sale under execution.

Some products, however, which would seem at first glance to fall naturally into the division of *fructus naturales*, have been held by the courts to be *fructus industriales*. The most prominent of these exceptions is that of hops. These have been almost uniformly regarded as personal property. Latham v. Atwood, Cro. Car., 51; Anon. Freem. Ch., 210; Frank v. Harrington, 36 Barb. (N. Y.), 41; Contra, Waddington v. Bristow, Bos. & P., 452, on the ground that although they grow out of perennial roots, the vines die yearly and the annual crop therefore depends in a great degree upon the annual labor and manuring of the owner, and is to be considered really an annual product. Cruciferous turpentine, usually known as "scrape," is treated as personal property while still adhering to the trees, because "it is not the spontaneous product of the trees, but requires annual labor and cultivation." Lewis v. McNatt, 65 N. C., 65. Trees in a nursery, also planted for the temporary purpose of cultivation until they are old enough to sell, are to be regarded as personal property for most pur-

poses, and the tenant may sell them, because such in his trade. *Wyndham v. Way*, 4 Taunt., 316; *Penton v. Robart*, 2 East., 88; *Miller v. Baker*, 1 Metc. (42 Mass.), 27; *Whitmarsh v. Walker*, Id., 313; *Maples v. Millon*, 31 Conn., 598. The same rule would apply to plants and bulbs raised by a florist for sale, and also to those, which, although perennial, are cultivated for the sake of the annual crop of flowers.

The character of realty impressed upon *fructus naturales* may be changed to that of personalty by a severance from the soil, either actual, as by felling timber, cutting grass, or gathering fruit and nuts, or in law, as by a written conveyance of the subject-matter; and they will then become subject to all the incidents of personalty, including liability to seizure in execution. (*Smith v. Jenks*, 1 Den., 580, S. C. 1 N. Y., 90; *McClintock's App.*, 71 Pa., 366; *Caldwell v. Fifield*, 24 N. J. L., 150; *Favorite v. Deardorff*, 84 Ind., 555.) A mere mortgage of growing trees or grass, however, does not work a severance until the mortgage becomes absolute by the non-performance of its conditions. *Bank v. Crary*, 1 Barb. (N. Y.), 543. As between landlord and tenant, a severance frequently occurs when, by custom or otherwise, the tenant becomes entitled to crops which are ordinarily part of the realty. *Wintermute v. Light*, 46 Barb. (N. Y.), 278. A written agreement by the landlord that the tenant shall have the fruit of certain trees after the termination of the lease, would certainly work a severance of it when that event took place. So, too, a retention of the ownership or control of the soil by the land-

lord would work a severance of whatever *fructus naturales* the tenant was entitled to under the lease. Even in Louisiana, where growing crops are expressly declared by statute to be part of the immovable, the growing crop of a tenant is, as to him, a movable, and hence is liable to levy and sale by a judgment creditor. (*Porche v. Bodin*, 28 La. An., 761; *Pickens v. Webster*, 31 La. An., 870.) Although, as has been seen, growing crops pass by a conveyance of the land, yet if that conveyance be in fraud of creditors, and the crops be such as are liable to execution in the hands of the grantor, they will be subjected to the claims of the creditors. *Erickson v. Patterson* (Minn.), 50 N. W. Rep., 699.

III.—The old test by which *fructus industriales* were distinguished from *fructus naturales* was, whether they were produced by the annual labor and manurance of the owner, or were simply the spontaneous product of the earth. It is evident at a glance that if this rule is to be applied strictly now, it will lead to very different results from those to which it formerly led. When it was adopted, the art of growing fruit, as at present understood, was practically unknown. There was but little market for its sale, and the trees that were planted, being only for the owner's own use, were usually left to take care of themselves, without any special care or manurance. But all this is now changed, and, on account of competition and the ravages of insect pests, fruit trees are now of necessity cultivated with extreme care, at least by those who make it a successful specialty. This is especially the case with peaches; and, although, as has

been noted, one Delaware case (*Roe v. Gemmill, supra*), has held that peaches are *fructus naturales*, and cannot be taken in execution while still on the trees; a Maryland case (*Purner v. Piercy*, 40 Md., 212, S. C. 17 Am. Rep., 591), claims that "a growing crop of peaches or other fruit requiring periodical expense, industry and attention in its yield and production, may be well classed as *fructus industriales*." If this is to hold good, all cultivated fruits and berries, which have heretofore been classed as *fructus naturales*, must now be considered and treated as *fructus industriales*, and the only fruits to remain under their old classification be those which, like huckleberries and cranberries, are still allowed to grow in a wild or semi-wild state, with little or no cultivation, except their first planting.

The reasons for rejecting the old test and its attendant consequences are very strongly presented in the preceding opinion, and the criterion there laid down seems to be much more in harmony with the spirit of the common law rule, in view of the changed circumstances of the present. The test of manurance and labor was manifestly only adopted as a convenient arbitrary method of deciding the question, not as a fixed and unvarying rule. The real intention was beyond a doubt to include among *fructus industriales* those products only which were not annexed to the soil, but which must be renewed annually by the labor of the owner; and among *fructus naturales* all those which remained permanently fixed, for a greater or less period, in the ground, and so became part of the freehold. It was on this principle that roots, although an-

nual, were at first held to go to the heir instead of to the executor, and that turnips, in *Emerson Heelis, supra*, were held to be *fructus naturales*; and it may well be assumed that the present doctrine that they are personal property is due not so much to the labor and cultivation required for raising them, as to their annual, perishable, transitory nature, which effectually precludes any thought of their ever becoming fixed and permanent in the soil. The true test, then, is the relation that the products of the land bear to it, whether they are so permanent as to become part and parcel of it, or are merely a temporary intrusion, so to speak; and the matter of labor is only a convenient, but now, owing to the change of conditions, a misleading arbitrary distinction, which has no controlling weight, and should be disregarded whenever it conflicts with the fundamental principle enunciated above.

IV.—The levy upon a growing crop may be made at any time after it has been planted; or if be raised from seed, at any time after the seed has been sown, even before it is up; for the crop growing in contemplation of law is soon as the seed has been sown. *Ayers v. Hawk* (N. J.), 11 Atl., 744; *Hare v. Pearson*, 4 Fred. (N. C. L.), 76; *Gillitt v. Truax*, 27 Minn., 52. It was held, however, in *Burleigh v. Piper*, 51 Iowa, 649, that a levy put into the sheriff's hands on March 2, with instructions not to sell until the grain had been harvested and stacked, was not valid against a chattel mortgage of the crop made subsequent to the levy, on the ground that the circumstances showed an intention on the part

the judgment creditor to hold the levy as a security merely; and that, as the writ could not be fully executed during its lifetime, the debtor would be put to the expense of a new writ. But this argument is very feeble in view of the fact that it is unquestionably for the advantage of the debtor that the sale be delayed until the crop be ripe, when something near its value may be realized; and, as will be seen, not only is the weight of authority in favor of such a course, but several States have express statutory provisions that the sale of a growing crop under execution shall not take place until it is matured and fit to be gathered.

The levy upon a growing crop need not be made in the same manner as a levy upon other chattels. The rules of law governing such a levy are peculiar to the subject-matter, and do not require any act on the part of the officer, so far as the levy is concerned, which, if it were not for the protection of the writ, would make him a trespasser. Actual possession or custody on the part of the officer would be both unnecessary and impossible as long as the farm on which the crop is growing is in the actual possession of the defendant: *Johnson v. Walker*, 37 N. W. Rep., 639. It is sufficient for him to go upon the premises and announce that he seizes the crop to answer the exigencies of the writ, or call disinterested parties to witness his open assertion of the levy: *Bilby v. Hartman*, 29 Mo. App, 125, or go upon the premises and notify the persons interested that he has made the levy: *Barr v. Cannon*, 6 Iowa, 20. An attachment upon an unripe growing crop in possession of the de-

fendant is sufficiently levied by serving upon him copies of the writ and statutory notice: *Raventas v. Green*, 57 Cal., 254.

In States where growing crops are liable to seizure, the lien of the execution binds them from the date of its *teste*, or its delivery to the sheriff: *Edwards v. Thompson*, 85 Tenn., 720; *McKenzie v. Lampley*, 31 Ala., 526; *Lindley v. Kelley*, 42 Ind., 294. But where the right of levying upon such crops is limited by statute, the lien of the execution does not attach until the time when the levy is allowable: *Edwards v. Thompson*, *supra*; *Adams v. Tanner*, 5 Ala., 740; *Evans v. Lamar*, 21 Ala., 333; *Scolley v. Pollock*, 65 Ga., 339. If other liens, as a chattel mortgage, for instance, are prior to the levy, its lien cannot prevail against them: *Houk v. Condon*, 40 Ohio St., 569, but after the levy has been made, the crop, while still remaining on the land, is not liable to a distress for rent, for during the time from the levy until the sale, it is considered as in *custodia legis*: *Smith v. Tritt*, 1 Dev. & Bat. (N. C. L.), 241. If the crop levied on be such as is classed among *fructus naturales*, the levy is absolutely void; and a parol permission from the defendant to the sheriff to seize such crops is an agreement relating to an interest in land, and consequently cannot validate the levy: *Bank v. Crary*, 1 Barb. (N. Y.), 543.

Where land is exempt under the homestead laws the crops growing thereon, being necessary to its beneficial enjoyment, are also exempt from levy and sale under execution. (*Cox v. Cook*, 46 Ga., 301; *Alexander v. Holt*, 59 Tex., 205).

V.—Although the levy be made while the crop is yet growing and

unripe, the execution creditor is not obliged to sell it at once; he may wait until it is ripe (*Whipple v. Foot*, 2 Johns. 418, S. C., 3 Am. Dec., 442), and the death of the defendant in execution before that time will not affect the validity of the levy and sale (*Eaton v. Southby, Willes*, 131). If, after the levy of an attachment upon a growing crop, the sheriff does nothing further until it is ripe, when he gathers it, there is no abandonment of the levy (*Raventas v. Green*, 57 Cal., 254). But, although the general and proper practice is to wait after the levy until the crop is ripe and fit to be gathered, on account of the injury that it would almost certainly occasion to the debtor to sell an unripe and growing crop; yet its personal character, and the right of levy on it, necessarily carry with them the right to sell it before it is ripe, if the execution plaintiff so elect (*Parham v. Tompson*, 2 J. J. Marsh, Ky., 159; *Stewart v. Doughty*, 9 Johns., 108). It has been held that the sale should be as soon as legally possible, because the duty of preservation and risk of keeping the crop safe do not devolve upon the officer (*Craddock v. Riddlesbarger*, 2 Dana, Ky., 205); but there is little force in this, for it is to the manifest advantage of the debtor that the crop shall bring as much as possible at the sale, whenever that takes place, and it is therefore his interest, and may be in so far considered *his* duty, to see to the preservation and safe-keeping of the crop. If it be sold while still unripe and growing, however, the title of the purchaser vests from that time against all others (*Coombs v. Jordan*, 3 Bland Ch., 284). He has a right to leave the crop upon the land until its

maturity, to enter and give it the necessary cultivation, and to gather and take it away when ripe (*Stewart v. Doughty*, *supra*; *Smith v. Tritt*, *supra*; *Thompson v. Craigmyle*, 4 B. Mon., Ky., 391, S. C., 41 Am. Dec., 240; *Bloom v. Welsh*, 3 Dutch., 177), and is to be allowed a reasonable time for that purpose (*Smith v. Tritt*, *supra*; *Shannon v. Jones*, 12 Ired., N. C. L., 206).

In order to make a valid sale of a standing crop, the officer need not go inside the field; it is sufficient if he be in view of it at such convenient distance that bidders can see what is offered and judge for themselves of the quantity, quality and value thereof (*Skinner v. Skinner*, 4 Ired., N. C. L., 175; *McNeely v. Hart*, 8 Id., 492). But a sale of a growing crop under execution, made at the distance of two miles from the place where the crop is standing, is void, and passes no title to the purchaser; for it is imperative that the crop be in the presence of the bidders (*Smith v. Tritt*, *supra*).

VI.—The interest of the judgment debtor in the crop is often a very important consideration in determining its liability to execution. When the debtor is the sole owner of the crop, of course this question cannot arise; but when other persons have an interest therein sometimes becomes a difficult matter to decide. The crops raised by the labor of a tenant by the curtesy initiate on land belonging to his wife are his, and are liable to execution for his debts (*Pourrier v. Raymond*, 1 Hannay, 520); but a crop raised on land held by husband and wife by entirety is held by them in the same manner as the land itself, and is not subject to levy and sale on execution against the husband.

alone (*Patton v. Rankin*, 68 Ind., 245; S. C., 34 Am. Rep., 254). A lessee under an ordinary lease is the sole owner of the crops raised, as against the lessor, and they are liable to seizure on execution only as against him; but when land is let on shares, or to a so-called cropper, it then becomes a pure question of intention, to be gathered from the terms of the letting, whether the tenant or the landlord, or both jointly, is the owner of the crop, and for whose debts it is liable to be seized. As a general rule, the possession of the land is of controlling importance. If the lessor gives up the entire possession to the lessee, the latter is sole owner of the crop (*Gordon v. Armstrong*, 5 Ired., N. C. L., 409; *Waltson v. Bryan*, 64 N. C., 764; if he retain the entire possession in himself, the lessee is only a hired servant, and the title to the crop is in the lessor (*Porter v. Chandler*, 27 Minn. 301); while if the latter retain a partial possession or control only, he and the lessee are tenants in common of the crop, and it is liable to execution against either, the purchaser acquiring, of course, a title to the share of the debtor only. (*Hansen v. Dennison*, 7 Ill., App. 73; *Creel v. Kirkham*, 47 Ill., 344; *Johnson v. Hoffman*, 53 Mo., 504; *Lowe v. Miller*, 3 Gratt., Va., 205; *Stewart v. Doughty*, 9 Johns., 108; *Thompson v. Mawhinney*, 17 Ala., 367; *Ponder v. Rhea*, 32 Ark., 435; *Guest v. Opdyke*, 31 N. J. L., 552; *Moulton v. Robinson*, 27 N. H., 550). When each party is to take care of his own portion of the crop when ripe, the share of each is liable to execution against him (*Liudley v. Kelley*, 42 Ind., 294), and, as a general rule, where the facts are doubtful, the inclination

is to hold the parties tenants in common of the crop (*Alwood v. Ruckman*, 21 Ill., 200).

When the agreement is that the cropper is to receive a portion of the crop in return for his labor, the title to the whole of the crop is in the lessor, and the cropper has no title to any part of the crop that can be taken in execution until he has been assigned his share by the lessor. *McNeely v. Hart*, 10 Ired. (N. C. L.), 63; *Rogers v. Colier*, 2 Bailey (S. C.), 58; *Porter v. Chandler*, *supra*. Where the lease contains a provision that the whole crop shall be at the control of the lessor until sold (*Esdon v. Colburn*, 28 Vt., 631), that the cropper's portion shall be assigned to him after he shall have paid his employer for the provisions furnished him while making the crop (*Hunter v. Edmundson*, Ga. Dec. Pt. 1, p. 74), or that the entire crop shall be the property of the lessor until all advances made by him to the tenant shall be repaid (*Howell v. Foster*, 65 Cal. 169), the lessee has no interest in the crop that can be attached or taken in execution, until he has complied with all the conditions of the lease. But when the share of the crops reserved to the lessor is in the nature of rent merely, the tenant has the exclusive possession of the soil, and consequently of the crop also; and the lessor, before his share is assigned to him, has no interest that can be levied upon. *Gordon v. Armstrong*, *supra*; *Williams v. Smith*, 7 Ind., 559; *Woodruff v. Adams*, 5 Blackf. (Ind.), 317; *Chissom v. Hawkins*, 11 Ind., 316; *Devore v. Kemp*, 3 Hill (S. C.), 259; *Harrison v. Ricks*, 71 N. C., 7; *Howard Co. v. Kyte*, 28 N. W. Rep., 609. In such a case, however, the crop may be

taken in execution against the lessee. *Sargent v. Courrier*, 66 Ill., 245.

VII.—In some States, certain crops have been exempted from execution (*Carpenter v. Herrington*, 25 Wend., 370; *Horgan v. Amick*, 62 Cal. 401); and in others, the common law right of levy has been limited by statute. The Louisiana Code (Art. 465) does away with the distinction between *fructus industriales* and *fructus naturales*, providing that "standing crops and the fruit of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached." In Alabama, the Act of 1821 (Aik. Dig., sec. 41, p. 167), provided that "it shall not be lawful for any sheriff or other officer to levy a writ of *fiери facias* or other execution, on the planted crop of a debtor . . . until the crop is gathered." This, however, was repealed within a few years. In North Carolina, the Act of 1844, ch. 35, prohibited officers from levying executions upon "growing crops," which was held, in *Shannon v. Jones*, *supra*, to embrace only crops which were not matured. The Georgia Code, sec. 3642, enacts that "no sheriff or other officer shall levy upon any growing crop . . . usually raised or cultivated by the planters or farmers of this State, nor sell the same until such crop shall be matured and fit to be gathered." Under this Act it was held, in *Scolley v. Pollock*, 65 Ga., 339, that cotton in the field, not matured, was not liable to levy and sale, and the purchaser of the crop in its then condition from the defendant, obtained a good title against an execution taken out previously. The Tennessee Code (M.

& V., sec. 3749) exempts a growing corn crop from execution until the 15th of November; and the Civil Code of Kentucky forbids the levy and sale of a growing crop until October 1. In this latter State, however, there is a very wise and just provision (sec. 439 of the Code) which allows such a crop, after return of "no property" upon a execution, to be subjected to the payment of a creditor's claim by proceeding in equity.

There are some strong objections to be urged against the statutory provisions which absolutely forbid the levy upon a growing crop; for they in effect allow the debtor to wholly defeat the just claims of his creditors by aliening the land, with which the crop passes as an incident, before its maturity. "It is in effect, a gift to the defendant in execution of the growing crop, provided he does not gather it himself, but disposes of it in its then condition." *ORMOND, J.*, diss. in *Adams v. Tanner*, 5 Ala., 740. It is true that the crop was liable to be sacrificed, under the common law rule, by a sale while it was unripe; but there was comparatively little danger of this, for it was equally to the disadvantage of the creditor, and as has been seen, the usual practice was to delay the sale until the crop was ripe, the lien of the levying creditor meanwhile making the creditor secure. In their anxiety to protect the debtor, the legislatures seem to have forgotten the creditor, who has equally strong claims to the protection. Such a course as that adopted in Kentucky, or that taken in Michigan (*Howell's Ann. Stat.* sec. 7685) and Minnesota (*Gen. Stat.*, 1878, c. 66, sec. 315), which permits the levy of the execution but forbids the sale of the crop un-

it is ripe, pays sufficient regard to the rights and interest of *both* parties, and is far preferable to that which forbids the levy, and so pre-

vents the lien from attaching, and enables the debtor to defraud the creditor of his just claims.

PHILADELPHIA.

R. D. S.

“RES ADJUDICATA.”

There seems to be a tendency to substitute the above words in the place of the classic “Res Judicata” of the same language.

The latter words have been consecrated by a precise meaning given to them by the great jurists since the classic period of the civil law.

Modestinus defines the term thus : “Res judicata dicitur quæ finem controversiarum pronuntiatione judicis accepit. Quod vel condemnatione vel absolutione contingit.”¹ In French it is called *la chose jugée*, and in English we improperly anglicize the “ad-judicata” and call it the thing adjudged, with the meaning that it is a judgment in a judicial controversy rendered by a Court of last resort, or in a case from which an appeal has ceased to be available and the judgment has come to import absolute verity between the parties.

The term *res adjudicata* is also known to the Roman law, but is applied only to a particular class of cases or to public sales of property.

There are in the civil law the three actions called the *judicia divisoria*, named *familiæ erciscundæ* (the partition of estates among heirs), *de communi dividundo* (partition of property held in common) and *finium regundorum*, the suit to settle controversies respecting boundaries between contiguous lands. In these actions the respective portions of the property to be divided are *ad-judicated* to the parties and their rights under the decree may be called *res adjudicatæ*.²

¹ Pandects, Liber 42, Tit. 1, Lex. 3. See also the Code, Lib. 7, Tit. 45, Const. 3.

² See Institutes of Justinian, Liber 4, Tit. 17, Secs. 6 and 7.

Goods (*bona addicuntur*) are adjudicated to the adjudicatee at judicial sales under the French and Louisiana law.¹

E. T. MERRICK.

New Orleans, La.

EDITORIAL NOTES.

BY G. W. P.

The case of *O'Neil v. The State of Vermont*, which is criticized by a correspondent in this number of *THE AMERICAN LAW REGISTER AND REVIEW*, is a decision of great interest and importance. Many vital questions of constitutional law are discussed more or less elaborately by Mr. Justice BLATCHFORD, who delivers the opinion of the majority; by Mr. Justice FIELD, who files a dissenting opinion, and by Mr. Justice HARLAN, in whose separate dissenting opinion Mr. Justice BREWER concurs. But perhaps no aspect of the case is more interesting than that which it presents when considered as a decision relating to the Federal power over interstate commerce. An examination of the opinion reveals the fact that the Court is divided upon a comparatively simple question belonging to this all-important branch of our constitutional law; and it seems impossible to escape the conclusion that the tribunal which had but a short time ago settled this doctrine upon a satisfactory basis is once more at sea in regard to it, the views of the individual justices being well-nigh hopelessly at variance with one another.

¹ See Savigny, Vol. 6, Berlin Ed., 1847, p. 257, Sec. 280; also 4th Vol., p. 532. Merlin *Repertoire verbis* "adjudicataire et adjudication," also verbis "Chose jugée;" Mackledey, Brussels Ed., 1846, pp. 239 and 240, *Partie Speciale* Sec. 505. See the accurate definitions in Burrill's *Law Dictionary* of *adjudicatio* and *adjudication*. See *Res judicata*, Chapter 2, pp. 5 to 11 of Bigelow on *Estoppel*.

The profession began to suspect the existence of this state of affairs when the decision in *Maine v. The Grand Trunk Railway* was handed down, a decision which was commented upon in the March number of this periodical. The suspicion received confirmation when the Court decided *Ficklen v. The Shelby Taxing District*, which Mr. FRANCIS COPE HARTSHORNE criticized in a contribution to the July number. At the conclusion of his remarks Mr. HARTSHORNE used this language: "There is much food for reflection in the thought suggested by the decisions of the Court for the last year, namely, how great a revolution of doctrine may result from a few changes in *personnel*." And now comes the case of *O'Neil v. The State of Vermont*, which substitutes certainty for suspicion on this point, and enables us to quote Mr. Justice FIELD in support of the view suggested by Mr. HARTSHORNE in the foregoing quotation. Says the learned Justice in his dissenting opinion: "When *Bowman v. Chicago, etc., Ry. Co.* was decided, Justices MATTHEWS, MILLER and BRADLEY were members of this Court and concurred in the decision. And when *Leisy v. Hardin* was decided the latter two justices were still members and concurred in that decision. These justices were distinguished for their ability and learning, and it was the occasion of great pride to them that they had contributed by their labors to establish that freedom of interstate commerce from State interference which made the different States, commercially, one country. * * * * * These three justices are no longer members of this Court, but since they ceased to be members there has been no adjudication by it until the decision in this case, which, in any respect, changes its previous decisions upon the exclusive power of Congress over interstate commerce." Although we do not agree with the learned Justice, that this is the first case which marks a departure from sound doctrine, we cannot but acquiesce when he intimates that in the decision of questions of interstate commerce the country is already beginning to feel the loss of those great jurists, Mr. Justice MILLER and Mr. Justice BRADLEY. In the case under dis-

cussion it is not so much the decision upon the question of interstate commerce that excites surprise (leaving the other points of the case out of consideration), as it is the mode of approaching the problem and the manner in which its solution is attempted in the majority opinion.

A citizen of New York was engaged in the retail liquor business, which was and is a lawful occupation under the laws of that State, and his commodities were legitimate subjects of commerce. In the ordinary course of business he received from the citizens of another State orders by mail, telegraph, and express for small quantities of these commodities accompanied (in the case of express orders) by receptacles for the liquor, upon which the freight charges were prepaid by the customers. These orders were executed, the receptacles were filled but in no way disguised, and were then shipped through the same express carrier back to the customers, the dealer taking the usual precaution, as the customers were unknown to him, of sending the commodities C. O. D. It turned out that the State into which the goods were thus sent—Vermont—had enacted a law making it penal, except in certain cases which do not affect the present question, to "manufacture, sell, furnish, or give away . . . spirituous or intoxicating liquor,"—under which description the above-mentioned subjects of commerce fell. The New York dealer was arrested under this statute, in consequence of an affidavit of complaint made before a Vermont justice of the peace. The patent defects in this document are ably discussed by our correspondent. Before the justice of the peace he was convicted and sentenced to pay a fine of over \$9,000 with about \$500 costs, and to be imprisoned for one month—the imprisonment to be prolonged, in the event of non-payment of the required sums within the month, for a period of seventy-nine years. A jury on appeal subsequently reduced the number of offences, so that the sentence of the County Court was for the insignificant fine of \$6,000 and, in default as above, for the trifling term of fifty-four years. On appeal

the Supreme Court of Vermont affirmed the judgment below.

Leaving aside the questions as to whether this was a humane and usual or a cruel and unusual punishment, and whether or not the proceedings under the Vermont statute amounted to "due process of law," it will be profitable to mark the ultimate fate of the contention made on behalf of the convicted dealer before the Supreme Court of Vermont, that the Vermont statute if applicable to this case was an infringement upon the exclusive right of Congress to regulate interstate commerce. That tribunal considered the question whether the title to the subjects of commerce passed to the purchaser before transit began or when they were delivered by the carrier in Vermont. The Court decided that "there was a completed executory *contract* of sale in New York, but the completed *sale* was, or was to be, in this State." The opinion then proceeded: "Concerning the claim that Section 8 of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the States, has application, *it is sufficient to say that no regulation of, or interference with, interstate commerce is attempted.*¹ This is a form of argument only too often found in the utterances of courts of last resort or of disputants whose opponents have no opportunity of replying to them. Although the thought is not expressed in so many words, we seem to feel that the Vermont Court had in mind some such idea as that a transaction which was consummated in Vermont could not be an interstate commerce transaction; and that the constitutional provision would have had application only in case the sale had been completed in New York. Groundless as such a view is, it constitutes the only

¹ Mr. Justice BLATCHFORD, in delivering the opinion of the majority, contends that this clause was intended by the Vermont Court to be applicable only to two seizure cases arising out of the same transaction and decided at the same time. It is at least doubtful whether such was the meaning of the Vermont Court. If it was, then that Court decided against O'Neil's contention that the act was a regulation of commerce without even attempting to justify so remarkable a decision.

trace of a reason to be found in the opinion for the conclusion which we have italicized above.

When the cause reached the Supreme Court of the United States, it was assigned as error, *inter alia*, that the Vermont Court had not held the statute void as in conflict with the Commerce Clause. But a majority of that tribunal decided that "the only question considered by the Supreme Court, in its opinion, in regard to the present case, was whether the liquor in question was sold by O'Neil at Rutland or at Whitehall, so as to fall within or without the statute of Vermont, and the Court arrived at the conclusion that the completed sale was in Vermont. That does not involve any Federal question." Accordingly the writ of error was dismissed for want of jurisdiction. Mr. Justice FIELD, in his powerful opinion, demonstrates the unsoundness of this position, when, after referring to the language of the majority opinion just quoted, he says, "To this I answer, that before the State Court could reach the question whether the sale fell under the law of Vermont, it had to determine whether the sale was completed in that State or in New York—whether, therefore, an executory sale of goods in New York, completed in Vermont, was or was not a transaction of interstate commerce, and until that question, which was a Federal one, was disposed of, the alleged State question could not be considered. But that the commercial question was brought to the attention of the Supreme Court of Vermont, was argued by counsel there and passed upon by that court, does not rest as an inference from the facts necessarily involved: it appears from its opinion and the official report of the case." The Federal question being thus before the Court, that tribunal has no right, he contends, to refuse to decide it, and, moreover, he urges that the decision, when rendered, should be adverse to the constitutionality of the Vermont statute. The transaction under consideration embodies "all the elements which constitute interstate commerce." "As said by this Court in *Welton v. State of Missouri*,¹ commerce 'comprehends intercourse for the pur-

¹91 U. S., 275, 280.

poses of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries and between the citizens of different States.' "

Mr. Justice HARLAN, with whom concurred Mr. Justice BREWER, agreed with Mr. Justice FIELD that a Federal question was necessarily before the Court and used the following language: "The decision that the sales were consummated in Vermont, and consequently that the defendant violated the laws of that State in doing what he did there, by his agents, is not in itself sufficient to support the judgment, except upon the theory that he had no right, under the Constitution of the United States, to send the liquors into Vermont to be there delivered in the original packages." These Justices were, however, of opinion that the sales in question "were not in any fair sense transactions of interstate commerce protected by the Constitution of the United States against the laws of Vermont" . . . "What he (the defendant) did was a mere device to evade the statutes enacted by Vermont. . . . The doctrine relating to 'original packages' of merchandise sent from one State to another State does not embrace a business of that character." This would seem to be a dangerous view of the case. Aside from the fact that there was nothing on the record to show that the defendant even knew of the existence of the foreign statute, it is to be remarked that the law will be deprived of all certainty if the Court undertakes to scrutinize in each transaction the *motives* which induced the person who claims the protection of the Commerce Clause to engage in interstate business. Such a doctrine could be applied, should the Court feel so inclined, to transactions involving any of the various branches of commerce, and there would be no assurance in a given case that the Court would not be pleased to consider that the complainant did what he did merely to "evade" the State legislation. The view of Mr. Justice FIELD is a satisfactory answer to this contention. "Nor can it make any

difference," he says, "what motives may be imputed to the parties on the one side in selling, and on the other in purchasing the goods; the only inquiry which can be considered is, were the goods bought and sold subjects of lawful commerce, for if so they were, in their transportation between the parties—citizens of different States—until their delivery to the purchaser or consignee in the completion of the contracts of sale, under the protection of the commercial power of Congress."

Such is the position of the Court on one of the points in this remarkable case. A cause comes before it necessarily involving, as it seems to us, a Federal question. The majority dismiss it for want of jurisdiction. Three judges are of opinion that the jurisdiction exists. Two of the judges would determine the question adversely to the appellant because they suspect that his motives have been bad. The other brings principle and authority to bear on the case and concludes that his brethren are overturning a well-settled and all important doctrine and depriving a citizen of the United States of the protection guaranteed by the Constitution.

In the meantime O'Neil has either paid the enormous fine or he has been thrown into prison for the rest of his natural life.

COMMENTS ON RECENT DECISIONS.

O'NEIL *v.* THE STATE OF VERMONT.

MR. EDITOR: The decision of the Supreme Court of the United States in the case of *O'Neil v. The State of Vermont*, rendered at the last term, excites an increasing interest as a knowledge of it extends among the busy members of the legal profession. It was the case of a prosecution and conviction in Vermont of a citizen of New York, for acts performed by him in the latter State, which were admittedly lawful there, but which would have been unlawful if committed in Vermont. Those acts were the selling of liquors at Whitehall, New York, to residents of Rutland, Vermont, upon orders received at Whitehall through an express company acting as the agent of the purchaser.

The decision of the Court was that the case had no business before it, and that it had no duty to perform except to dismiss it. Having thus denied its own right to decide any points involved in the case other than that of jurisdiction, it proceeds to discuss with great minuteness and to decide every point made on the appeal from the Supreme Court of Vermont.

O'Neil's counsel contended in his brief that as the sales in question were acts of interstate commerce no State statute could make them unlawful. The Supreme Court of Vermont, in discussing this point, dwelt upon the deplorable consequences that would follow if the power of Congress to regulate commerce between the States could be invoked to prevent a State from inflicting penalties for engaging in such commerce. Nevertheless the majority of the United States Supreme Court declared that this argument and decision thereon raised no federal question.

But this total subordination of the commerce powers of the Federal government to a State statute, contradicting as it does every previous decision of the Court on the subject, and setting at naught the mighty interest which was the primary cause of the formation of the Federal Constitution, is less startling than the attempted justification by the Supreme Court of the United States of a State statute which authorizes imprisonment for life by a Justice of the Peace, without trial by jury, upon a complaint which gives an alleged offender no information of the of the offences of which he is accused. This is a Russian method, and is without precedent or analogy in the judicial history of any English-speaking people.

The Vermont statute against selling intoxicating liquors provides that under an indefinite charge of one offense the defendant can be tried for an indefinite number of offenses. In the case under discussion the only charge made against John O'Neil was that "on the 25th day of December, 1882, he did at divers times sell, furnish and give away intoxicating liquor without authority." Under this charge, which describes no sale by naming the purchaser, he was convicted by the petty magistrate of 457 separate offences, which on appeal were reduced to 307, and he was

sentenced to pay \$20 for each offence, with nearly \$500 costs, making total of about \$6,600, and in default of payment thereof to be confined to hard labor at the rate of three days for each one dollar of the sum, making his term of imprisonment more than fifty-four years.

In commenting upon this extraordinary decision the *Albany Law Journal* of the 7th of May says :

"This monstrous perversion of justice presents a glaring contrast to the humane rule laid down by our Court of Appeals in the Tweed case respecting cumulative sentences, which is that the punishment in one indictment shall not exceed the maximum pronounced for any one of the offences."

The Constitution of the United States forbids the infliction of cruel and unusual punishments, thus granting to every citizen an immunity from such punishment. The Fourteenth Amendment of the Constitution forbids the denial or abridgment of this immunity by the State of Vermont or any other State in the case of any citizen. It furthermore decrees that neither the State of Vermont nor any other State shall deprive any person of life, liberty or property without due process of law. It was the view of Justice FIELD, as expressed in his dissenting opinion in the present case, that in criminal proceedings there can be no due process of law where the accused is not informed of the nature and cause of the accusation against him. He quoted Chief Justice GIBSON of the Supreme Court of Pennsylvania upon this point as follows :

"Precision in the description of the offence is of the last importance to the accused, for it is that which marks the limits of the accusation and fixes the proof of it."

I have not addressed you this communication to add anything of my own to the utterances of these great men. I have written it solely for the purpose of giving your readers the benefit of some observations hitherto unpublished on this O'Neil case, written by the most distinguished writer on Criminal Law in the United States, and one whose treatises are often quoted as high authority in the Supreme Court of the United States, as well as in the courts of the several States. I refer to JOEL P. BISHOP, the author of "Bishop's Criminal Law" and "Bishop's Criminal Procedure." In this paper, written for private perusal only, and from which I am permitted to quote, he says :

"The foundation of the cause was laid in the court of a Justice of the Peace, an inferior magistrate having, by the universal legal understanding in all countries where our system of law prevails, authority only in small matters, and sitting in Vermont without the aid of a jury. If there was any defect in the jurisdiction of this magistrate it was not cured by an appeal to the County Court, or the further carrying of the question of law to the Supreme Court of the State.

"The Fourteenth Amendment of the Constitution of the United States declares that the State of Vermont shall not 'deprive any person of life, liberty or property without due process of law.' It is plain to our mind that this proceeding before this inferior Vermont magistrate was not 'due process of law' on which to strip a man of his property and send him to perpetual imprisonment, according to any opinion ever expressed."

pressed by any competent legal person. So that the Fourteenth Amendment utterly took from the magistrate jurisdiction over the cause, and jurisdiction, by universal legal practice, when it is of this sort, is a point never waived; it is the foundation of every suit, and any judgment without it is void. The case then was this:

"By force of the Constitution of the United States, the Vermont record appeared before the United States Supreme Court as rendered without jurisdiction; it was the constitutional duty of that Court to declare it so. The Constitution of the United States was the highest law for that Court as well as for the people; and even if there had been, as there was not, an Act of Congress forbidding the taking of that point when it was not raised before the Vermont magistrate or before the Federal Supreme Court, the Act would have been void; the question having come before the latter tribunal in due course the Constitution, which was the highest voice, commanded it to reverse the judgment.

"But was the Vermont magistrate deprived of jurisdiction on the ground that his proceeding was not "due process of law?" The complaint or information before him charged but a single offense, and set out this offense only imperfectly. If it had been for this offense, punishable as it was by a small fine and slight imprisonment, that the defendant was put upon his trial, I do not see that the proceeding before the magistrate might not have been deemed "due process of law," but in fact he was made to stand his trial, not for this one offense, but for an infinite conglomeration of offenses, though the magistrate found him guilty of only 457, and the jury, on appeal, of only 307. But the jurisdiction which the magistrate assumed, and which was affirmed by the County Court, and subsequently by the Supreme Court of the State, was to try the party for infinite offenses, to take from him more property than any mortal on earth ever owned, and to imprison him for more years than any man ever lived. Not only was this jurisdiction assumed by a magistrate universally held to be inferior, but by one equally so under the general laws of Vermont, one who had there no authority thus to fine and imprison a man for any of the non-capital felonies, but whose exceptional power extended only to one class of inferior offenses. Beyond this, the jurisdiction assumed was to try the defendant as to all these infinite offenses, but one, utterly without allegation. It is a mockery to ask any lawyer or any other man, who knows anything of our legal history or procedure, if this is "due process of law." Even if it was competent for Vermont to try all crimes in this way, it was plainly not competent to discriminate thus against an inferior offender, and give a jurisdiction to inflict the highest penalty known to laws, short of death, to a magistrate sitting without a jury, when the general laws of the State pronounced incompetent to inflict such or even a greatly less punishment.

"Let us now assume that I am wrong in deeming the information before the magistrate to charge only one offense, and that it in fact charged infinite offenses. We may admit that this is what the Vermont statutes undertook to make it. If it is, then it is not "due process of law" in Vermont. But I am here answered by the assertion that the Supreme Court of Vermont has the exclusive jurisdiction to settle this

question of the effect of the Vermont Constitution, and it has settled adversely to what I thus claimed. My reply is that while this may have been so before the adoption of our Fourteenth Amendment, it is not now. By settled doctrine in the United States Supreme Court, it is for that Court to decide as supreme law whether or not its tribunal has violated the Constitution of the United States.

"The tribunal takes judicial cognizance of all the written laws of the State and of the fact that the Constitution of a State is its highest law over-riding its statutes. It knows and admits that a State process violative of a State Constitution is not "due process of law" in the State. And its jurisdiction under the Fourteenth Amendment to determine whether it is "due process of law" in the State of Vermont carries with it the authority to construe the Vermont Constitution. I see no escape from this conclusion.

"But assuming this reasoning not to be correct, and still assuming that the information before the Vermont magistrate charged infinite offenses, I confidently assert that the allegation of infinite offenses, the quantum of wrong with which the defendant is accused being thus without any limit, is not an allegation of any one offense, nor of any 30 offenses, nor of any 457 offenses; therefore, that to put a man on his trial upon such an allegation is to try him without averment, which everyone admits to be without due process of law.

"I admit that I am without authority for this construction of the allegation of infinite offenses. And the reason why I have no authority is that this Vermont idea is absolutely original and unique; no right-thinking person ever before deemed such an allegation permissible or even attempted to make it. *So that this is the first opportunity for its construction which ever arose.* But reason declares that to charge a man with everything is to charge him with no one thing in particular, and that an averment which justifies the putting of a man on his defense is that of a particular act, not of infinite acts in general.

"Here again I am told that this is a question for the Vermont Court and not for the Supreme Court of the United States. And this is equivalent to my being told that the Fourteenth Amendment of our Constitution is a nullity. For on the assumption that this question is for the Vermont Court, and that the Federal Supreme Court has no power of review over it, the clause under consideration in the Fourteenth Amendment is interpreted down to read as follows: 'Nor shall any State deprive any person of life, liberty or property without some process of law which on the question being carried before the highest Court of the State, shall not be pronounced by such Court unconstitutional or otherwise void.'

"It requires no argument to show that a clause in our National Constitution in these terms would be a practical nullity, or that a decision giving to any provision this interpretation would be an attempt to strike it out of the Constitution. I do not believe that there is a member of the Supreme Court who, on due reflection, would rule any case in this way. I know there was something a little like this said in the 'Opinion of the Court' in *Hurtado v. People*, 110 U. S., 516, 532. But I do not understand even that *dictum* as going so far; if it did it is plain that no bene-

of judges can thus travel out of the record before them, and by an assertion written by a single judge overturn and banish from our Constitution any provision therein—even an amendment.

“Again, let us assume that the information before the Vermont magistrate did charge all the offences whereof the party was found guilty. Still by the universal understanding in all countries wherein our system of laws prevails, and by the universal understanding in Vermont as to everything else except liquor selling, it is not due process of law to fine a man even the lower sum of \$6,140 with \$497.96 costs, and commit him to imprisonment at hard labor even for the lower period of fifty-four years, on this trial and sentence before a Justice of the Peace, sitting without a jury. If the Fourteenth Amendment of our Constitution does not prohibit this, and render the proceeding void for want of jurisdiction, that amendment, I need not repeat, was made in vain.”

I think the legal profession need only be informed concerning this upholding, by a majority of the Supreme Court of the United States, of the despotic statute of Vermont, and the outrage committed under its authority, to arouse them to a realization of the dangers which confront the liberties of citizens, imperilled as they are by the revolutionary ideas promulgated by the highest judicial tribunal in the land. Public opinion based upon correct information and right reasoning in time reverses unjust decisions, as it changes imperfect constitutions and obliterates obnoxious laws.

It may be very desirable to prevent a New York liquor vender from selling liquor to Vermont tipplers, but it is much more important to maintain the ancient liberties of the people, and protect every citizen from the exercise, by a petty magistrate, of the arbitrary power which exists nowhere outside of Russia and Vermont, and in the former sends a subject to death by slow torture in Siberia, without a hearing, and in the latter dooms a citizen to imprisonment for life on the heinous charge of selling liquors “at divers times” on a given day without further specification.

It is to be hoped that Mr. BISHOP will place his views in a permanent form in a future edition of his work on criminal proceedings.

SENTINEL.

ABSTRACTS OF RECENT CASES.

[Selected from the current of American and English Decisions.]

BY

HORACE L. CHEYNEY, HENRY N. SMALTZ, JOHN A. MCCARTHY.

ACTION FOR DEATH OF HUSBAND—NEGLIGENCE—PROXIMATE CAUSE.—A statute of Colorado giving a right of action to the husband or wife of a decedent killed by the negligent act of another, provides also "that if there be no husband or wife, or he or she fails to sue within one year after such death, then (suit may be brought) by the heir or heirs of the deceased." Within the year after the death of her husband the plaintiff instituted proceedings against one Anderson and was nonsuited upon the ground that Anderson was not a proper party defendant. Two weeks after the termination of the suit, but nineteen months after her husband's death, the plaintiff began the present action against the defendant. It was held: That since the statute was remedial it was entitled to liberal construction, and as the wife had *bona fide* began an action within the year, even though against a wrong party, that was sufficient indication of her intention to assert and maintain her statutory right: *Hayes v. Williams*, Supreme Court of Colorado, June 6, 1892, *HELM*, J. (30 *Pacific Rep.*, 352).—*J. A. McC.*

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.—The insolvency of a banking corporation rendered immediate action necessary in order to preserve the property from destruction and protect creditors. Of the seven directors three were non-residents, and of the latter one had sold his stock and had done nothing with the bank for several years; another was travelling and his whereabouts was unknown; the third lived in another State and was inaccessible for immediate notice. The four remaining directors, being a quorum, called a meeting of the board of directors authorizing the president and secretary of the bank to assign all the property to one Shumway for the benefit of creditors; in pursuance whereof a deed of assignment was executed in due form and properly filed. Subsequently two of the absent directors recognized the validity of the assignment by attending and participating in the election of an assignee as provided by the law. There was no objection either on the part of the bank as a corporation or any director, to the assignment. *Held*: That these circumstances were sufficient to constitute an exception to the positive rule requiring *all* the directors of an insolvent corporation to join in and become parties to an assignment for the benefit of creditors, and that a writ of mandamus would issue to compel Shumway to discharge his duties as assignee: *National Bank of Commerce v. Shumway*, Supreme Court of Kansas, July 8, 1892, *HORTON*, C. J. (30 *Pacific Rep.*, 411).—*J. A. McC.*

BONDS—CHANGE IN OBLIGATION—RELEASE OF SURETY—DEATH.—The cashier of a bank, who had given bond for the faithful performance of his duties, undertook for an additional compensation to keep the book

known as the "individual ledger." He embezzled the funds of the bank, and in an action brought against the executrix of the surety on the bond, *held*: That the undertaking to perform duties not belonging to the office of cashier did not effect such a change of duties as to discharge the surety from his liability. That the undertaking of the surety "for himself, his heirs, executors and administrator" during the period of the cashier's employment as such was not affected by the death of the surety: *Shackamaxon Bank v. Tard*, Supreme Court of Pennsylvania, July 13, 1892, per WILLIAMS, J. (24 Atl. Rep., 635).—*H. N. S.*

CARRIERS OF PASSENGERS—REASONABLE REGULATIONS—REFUSING TICKET.—Where a ticket was refused by a gateman because its date was illegible, and the holder thereby lost the train, in an action brought against the railroad for damages, *held*: That as the ticket was in the same condition as when purchased from defendant's agent, it was unreasonable that the plaintiff should be compelled to present the ticket to a ticket receiver for endorsement, and the defendant was liable in such damages as were the immediate consequence of its wrongful act: *Northern Cent. Ry. Co. v. O'Connor*, Court of Appeals of Maryland, June 8, 1892, per ROBINSON, J. (24 Atl. Rep., 449).—*H. N. S.*

CARRIERS—EJECTION OF PASSENGER.—The plaintiff was ejected from defendant's train for refusing to pay his fare after the ticket which he presented was refused by the conductor because it had expired. *Held*: (1) That the right to eject him for non-payment of fare is in no way affected by any belief he may have had as to his right to ride on the ticket after its expiration; (2) In the absence of any statutory regulation affecting the manner of ejection of a passenger refusing to pay his fare, he may be ejected at any place along the line, provided he be not thereby unreasonably exposed to danger: *Rudy v. Rio Grande Ry. Co.*, Supreme Court of Utah, June 17, 1892, ANDERSON, J. (30 Pacific Rep., 366).—*J. A. McC.*

CHARTER PARTY—"RESTRAINT OF RULERS," ETC.—QUARANTINE REGULATIONS—DUTY OF VESSEL.—A vessel, agreed by charter, party to be at a certain port, and, in all respects, ready to load under the charter on or before October 1, "restraint of princes or rulers of people" being excepted. By reason of quarantine regulations of the port the vessel could not go there until November 1, when the quarantine was raised. It was *held* that detention, by quarantine, was included in the scope of the clause, "restraint of rulers," etc., but that it was the duty of the vessel to have been at the port of loading within a reasonable time after the quarantine was raised: *The Progreso*, Circuit Court of Appeals of the United States, Third Circuit, May 24, 1892, GREEN, J. (50 Fed. Rep., 835).—*H. L. C.*

CONFLICT OF LAWS—MARRIED WOMEN—CONTRACTS—PLACE OF PERFORMANCE AND EXECUTION.—B., a married woman, signed and sealed in Pennsylvania a bond and mortgage to secure the purchase money of land in Delaware. This was delivered in Delaware by her husband as her agent. The land was sold subject to the mortgage, and as a

subsequent foreclosure sale did not realize the mortgage debt, judgment was entered on the bond in order to collect from B. in Pennsylvania the balance due. Her application to open judgment was granted, on the ground that the bond was a Pennsylvania contract, and it could not be enforced against her except as to the land. On appeal, *held*: That the laws of Delaware under which a married woman is personally liable on such a bond should be enforced, as being the law of the place where the contract was not only to be performed, but was executed; the place where a contract was executed being determinable from the place where it is delivered, regardless of where it is prepared and signed: *Baum & Birchall, et ux.*, Supreme Court of Pennsylvania, July 13, 1892, *WILLIAM J.* (24 Atl. Rep., 620).—*H. N. S.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE POWER.—Article XXXIV of the Maryland code provides that "All persons claiming logs cast by wind and tide upon any shore bordering upon the Chesapeake Bay and its tributaries, are hereby prohibited from removing the same without payment to the owner of the said shore the sum of twenty-five cents for each log so removed." This statute is valid and constitutional as an exercise of the police power of the State; although the logs may have carried away from a point without the boundaries of the State: *Henry v. Roberts*, Circuit Court of the United States, District of Maryland, May 16, 1892, *MORRIS, J.* (50 Fed. Rep., 903).—*H. L. C.*

CONSTITUTIONAL LAW—INSPECTION OF PRIVATE PAPERS.—The president of an insolvent national bank, who was charged with a violation of the national banking laws, filed a bill in equity against the receiver of the bank, praying that the latter be compelled to deliver to the complainant a certain trunk which was deposited in the vaults of the bank at the time of the appointment of the receiver, and which the bill alleged contained certain private papers of the complainant. Upon hearing the Court appointed a master to privately examine the contents of the said trunk, with directions to deliver to the complainant such papers as belonged to him, to deliver to the receiver any papers belonging to the bank which did not concern the prosecution of the president, and to hold until further orders such papers as related to the business of the bank and which were material in the prosecution of the president of the bank. It was *held* that this order was a violation of the constitutional and fundamental right of the litigant as to the method of trial: *Potter & Beal*, Circuit Court of Appeals of the United States, First Circuit, June 1, 1892, *PUTNAM, J.* (50 Fed. Rep., 860).—*H. L. C.*

CONTRACTS—ILLEGAL AGREEMENT.—Where the plaintiff leased premises for the keeping of liquor for sale, the landlord agreeing to supply ice to keep the premises cool, if the sale of such liquor is in violation of a State statute and illegal, the tenant cannot recover for damage to the liquor caused by failure of the landlord to supply ice as agreed: *Kelly v. Courter*, Supreme Court of Oklahoma, July 1, 1892, *CLARK, J.* (30 Pacific Rep., 372).—*J. A. McC.*

CRIMINAL LAW—EVIDENCE—VOLUNTARY CONFESSION.—The accused in an indictment for murder said to the sheriff, "I have sent for you to tell you about my case," to which the sheriff replied, "If you are going to tell the truth I will listen to it and want to hear it; if you are not going to tell the truth I don't want to hear it." The declarations of the accused testified to by the sheriff being admitted in evidence, and excepted to, on appeal *held*: That the confession made to the sheriff was voluntary and admissible: *Haul v. State*, Supreme Court of Alabama, May 26, 1892, per COLEMAN, J. (11 So. Rep., 218).—*H. N. S.*

EXPERT EVIDENCE.—In an action against a railroad company for an injury to the plaintiff sustained by a train running into a snowbank, the question at issue was whether the train was running at a dangerous rate of speed at the time. *Held*: That neither the engineer nor conductor could be called as experts to testify as to that fact: *Fisher v. Oregon S. L. and U. N. Ry. Co.*, Supreme Court of Oregon, June 21, 1892, FORD, J. (30 Pacific Rep., 425).—*J. A. McC.*

FELLOW SERVANTS—INJURY TO SERVANT.—The plaintiff, a brakeman in defendant company's employ, was injured while coupling flat cars, because of insufficient room between one of the cars and the lumber on the other, which was so loaded as to project beyond the end of the car. *Held*: That inasmuch as it was the duty of the company to furnish a safe place for coupling, it was not excused by having furnished an inspector to whose omission the accident was due; his negligence not being that of a fellow servant: *Dewey v. Detroit G. H. & M. Ry. Co.*, Supreme Court of Michigan, July 28, 1892, McGRATH, J., MONTGOMERY and GRANT, J.J., dissent (52 Northwestern Rep., 942).—*J. A. McC.*

FIRE INSURANCE—CONSTRUCTION OF POLICY—HAZARDOUS USE OF PREMISES.—The printed part of a policy of insurance, issued at a time when the insured premises were unoccupied, provided that it should become void if benzine, gasoline, etc., or other explosives should be kept or used on the premises. These were the only uses prohibited by the policy as hazardous. A written slip attached to and made part of the policy, provided that the premises were "privileged to be occupied for hazardous or extrahazardous purposes." *Held*: That inasmuch as there was a glaring inconsistency between the printed and written part of the policy, that which is written must prevail; also that the use of the premises as a paint factory in which benzine and gasoline were kept and used in the manufacture of paints, was permissible by the written part of the policy: *Russell v. Manufacturers and Builders' Fire Insurance Co.* of New York, Supreme Court of Minnesota, July 7, 1892, MITCHELL, J. (52 Northwestern Rep., 906).—*J. A. McC.*

FOREIGN CORPORATIONS ACTING WITHOUT AUTHORITY OF STATE—QUO WARRANTO.—Although the courts of a State other than that in which a corporation is created, have no power to oust such corporation of its right to be a corporation, or to interfere in any manner with the exercise of the rights and franchises conferred upon it by the State where incorporated, yet where such corporation is found transacting business in

another State and exercising the franchises conferred upon its corporations, without any authority, the courts of the latter State may by a proceeding in *quo warranto* oust the corporation from the exercise of such franchises: *State v. The Fidelity and Casualty Company*, Supreme Court of Ohio, June 24, 1892, MARSHALL, J. (31 N. E. Rep., 658).—*H. L. C.*

FOURTEENTH AMENDMENT—CIVIL RIGHTS—THEATRES—COLORED PERSONS.—In the absence of a State "civil rights statute," a rule of a theatre prohibiting colored persons from occupying seats in certain portions of it, may be enforced, as such rule is not a violation of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States . . . nor deny to any person the equal protection of the laws: *Younger v. Judah*, Supreme Court of Missouri, July 2, 1892, BLACK, J. (19 S. W. Rep., 1109).—*H. L. C.*

JUDICIAL SALE—TITLE OF PURCHASER.—The reversal for errors or irregularities of a decree ordering a sale of land will not affect a purchaser in good faith, providing the Court had jurisdiction to pass the decree, and all necessary parties were before the court: *Benson, et. al., v. Yellott, et. al.*, Court of Appeals of Maryland, June 7, 1892, per FOWLER, J. (24 Atl. Rep., 451).—*H. N. S.*

JUROR—COMPETENCY—OPINION AS TO GUILT OR INNOCENCE.—A juror who states upon his *voir dire* that he has formed an opinion as to the guilt or innocence of the accused, which will require evidence to remove, is incompetent, although he may state that he can discard the opinion that he has formed, and give the defendant as fair and impartial a trial as though he had never heard of the case: *Vance v. State*, Supreme Court of Arkansas, June 25, 1892, HUGHES, J. (19 S. W. Rep., 1056).—*H. L. C.*

MARRIAGE—MINOR—RIGHT TO EARNINGS.—The marriage of a minor son, even without the consent of his father, effects an emancipation, and the son is entitled to his wages, in so far as they are necessary for the support of himself and family, in preference to his father: *Commonwealth v. Graham*, Supreme Judicial Court of Massachusetts, June 24, 1892, FIELD, C. J. (31 N. E. Rep., 766).—*H. L. C.*

NEGLIGENCE—TENEMENT HOUSES—LIABILITY OF LANDLORD TO THIRD PERSONS.—The owner of a tenement house is not liable for injuries sustained by a person caused by the defective condition of the steps leading to the different parts thereof, where the injuries were received while the plaintiff was coming from a wake held in the house, to which she had neither an express invitation nor one by implication as being a relative or friend of the deceased: *Hart v. Cole*, Supreme Judicial Court of Massachusetts, June 22, 1892, KNOWLTON, J. (31 N. E. Rep., 644).—*H. L. C.*

PERSONAL INJURY—UNAUTHORIZED DISPLAY OF FIRE WORKS.—A person who is a voluntary spectator of a display of fire works in a public highway, cannot recover damages for injuries sustained by an explosion of the fire works, if such explosion occurred without negligence, even if the display is without legal authority: *Scanlon v. Wedger*, Supreme Judicial Court of Massachusetts, June 21, 1892, ALLEN, J. (31 N. E. Rep., 642).—*H. L. C.*

PLEADING—INSURANCE—CONDITIONS OF POLICY—DEPARTURE.—A clause of the policy of fire insurance upon which suit was brought, provided for the selection of appraisers and an award in case the parties differed as to the amount of the loss. *Held* (1) that compliance with the provision was a condition precedent to the maintenance of an action by the assured and a failure to allege in the complaint the appointment of appraisers, and an award was fatal to the plaintiff's case; (2) that plaintiff could not cure the defect in his complaint by relying upon the answer of the defendant which did allege the appointment and award, especially when by certain averments in his replication he put in issue the very allegations in the answer upon which he relied to cure the defect; (3) that it could not be contended that there was a departure because the replication admitted the award, but alleged fraud in the procurement of it, since the plaintiff could not quit or depart from a case made in the complaint, when none had been made: *Monsees v. German-American Insurance Co.*, Supreme Court of Minnesota, July 1, 1892, COLLINS, J. (52 Northwestern Rep., 932).—*J. A. McC.*

POWERS—EXECUTION—CONFLICT OF LAWS.—Testatrix, domiciled in R. I., bequeathed one-sixth of her residuary estate in trust for the benefit of her grandson during his life, and at his death to those whom he should appoint by will, and in default of such appointment, then to her heirs-at-law. The grandson died in New York without issue, leaving a will in which he did not mention the fund in question nor execute the power given him. By New York law a general bequest passes property over which the testator has a power of appointment, unless a contrary intention appears. In R. I., an intent to execute a power must appear affirmatively. Upon issue, raised by a bill in equity, whether there had been an execution of the power by the residuary clause of the will. *Held*: That where the execution of a power is in question, the law of the domicile of the donor governs, and not that of the domicile of the donee. That an intent to execute the power could not be inferred where the will contained no reference thereto; though the relations of the donee to the donor were so intimate as to raise a presumption that he knew of the contents of the donor's will, and, though the donee in his will, made bequests exceeding the amount of his estate: *Cotting v. De Sartiges, et. al.*, Supreme Court of Rhode Island, March 28, 1892, per STINESS, J. (24 Atl. Rep., 530).—*H. N. S.*

RESCISSION OF SALE—EFFECT OF A FAILURE TO CALL A MATERIAL WITNESS.—Where a defendant resists the foreclosure of a purchase money mortgage of a mine upon the ground that the purchase was induced by the fraudulent misrepresentations of the plaintiffs, it is abso-

lutely essential to his success that such misrepresentations were the proximate inducement to the purchase. But where the evidence disclosed that before the purchase defendant in company with an experienced miner examined the mine for several days; that afterward defendant was enthusiastic about the purchase and told several witnesses that he bought the property on his own judgment and the judgment of the expert; that after the purchase he surveyed and worked the mine for nearly two years before executing the notes and mortgage in suit, and made no complaint of the mine until plaintiffs threatened to bring the action. *Held* (1) that the evidence justified the finding that defendant did not make the purchase, relying on plaintiff's representations; (2) that the failure of the defendant to secure the testimony of a person present when the alleged misrepresentations were made without explaining why such person was not called, authorized the inference that the testimony if produced would be adverse to the defendant: *Wimer v. Smith*, Supreme Court of Oregon, July 2, 1892, LORD, J. (30 Pacific Rep., 416).—*J. A. McC.*

SATISFACTION OF JUDGMENT—AUTHORITY OF ATTORNEY.—A recovered a judgment of \$1,000 against B in an action of slander. There was some doubt as to the correctness of the judgment, and before an appeal was taken the attorneys of both parties agreed upon a compromise that B should pay A \$600 in full satisfaction, which sum was paid and the judgment satisfied of record. Two years later a motion on the part of A to strike off the satisfaction, upon the ground that his attorney had no authority to effect the same, was sustained. B then filed a petition praying the Court to enjoin the collection of the excess of \$600, alleging that A owned but one-half of the judgment, and that his attorney who effected the compromise owned the other half. *Held*: that B was entitled to equitable relief. NOWAL, J., dissented upon the ground that the order vacating the entry of satisfaction was *res adjudicata* as to all matters which could have been litigated at the hearing, among which were the facts contended for in the plaintiff's petition: *Phillips v. Kuhn*, Supreme Court of Nebraska, July 2, 1892, MAXWELL, C. J. (52 Northwestern Rep., 881).—*J. A. McC.*

SERVICE OF WRITS—AMENDMENT OF RETURN—POWERS OF EX-SHERIFF.—After a sheriff or deputy sheriff has gone out of office, he cannot, without some order of the Court giving direction in the matter, amend an incomplete or defective return of service made by him while in office: *Beutell v. Oliver, et al.*, Supreme Court of Georgia, April 28, 1892 (15 S. E. Rep., 307).—*R. D. S.*

SLANDER—EXEMPLARY DAMAGES—MALICE.—Exemplary damages can only be awarded in an action of slander where the defendant was actuated by malice toward the plaintiff. The law implies malice where the words spoken impute a crime to the plaintiff, and the defendant asserts their truth in his answer and reiterates the same upon the witness stand at the trial, it having been shown they were false: *Walker v. Wickens*, Supreme Court of Kansas, June 11, 1892, *per. cur.* (30 Pacific Reporter, 181).—*J. A. McC.*

STOREKEEPERS—CARE OF CUSTOMERS' PROPERTY—BAILMENT.—

Where one entered a store for the purchase of clothing, and deposited his watch for safe-keeping in a drawer, designated by the salesman, and after his purchase the watch could not be found, in an action brought to recover the value of the watch. *Held*: That as such deposit was a necessary incident of defendant's business, he was a bailee for hire, and as such bound to exercise ordinary diligence, and only in the absence of such diligence would he be liable if the watch was stolen: *Woodruff v. Painter, et. al.*, Supreme Court of Penna., July 13, 1892, per HEYDRICK, J. (24 Atl. Rep., 620).—*H. N. S.*

TENANT IN COMMON—PAROL PARTITION—EJECTMENT.—

Where a parol partition of lands is made by tenants in common, and the premises are occupied according to the partition by the respective parties, the partition will be valid, and such partition may be set up as a defence should an action be brought to recover the possession, in violation of the parol partition, and a bill in equity may be maintained to compel the delivery of a deed. But ejectment will not lie to recover possession of a part allotted by such parol partition, as in ejectment the plaintiff must recover upon a legal title and not upon an equity, and the parol partition may not be treated as a deed: *Sontag v. Bigelow*, Supreme Court of Illinois, June 18, 1892, CRAIG, J. (31 N. E. Rep., 674).—*H. L. C.*

TRADEMARKS—LABELS COUNTERFEITING.—

The law protects labels for the same reasons that it protects trademarks, and where labels are so successfully counterfeited that ordinary purchasers, buying with the degree of care usual in purchases of the article, are deceived, the complaining party is entitled to protection: *Wirtz v. Eagle Bottling Co.*, Court of Chancery of New Jersey, July 18, 1892, per VAN FLEET, V.C. (24 Atl. Rep., 658).—*H. N. S.*

“THE ADOPTION OF A UNIFORM BILL OF LADING IN INTERNATIONAL COMMERCE.”

The October Number of the AMERICAN LAW REGISTER AND REVIEW will contain an article on the Adoption of a Standard Bill of Lading in International Commerce, by the distinguished admiralty lawyer MORTON P. HENRY, Esq. In view of the fact that legislation on this subject will occupy the attention of Congress at the coming session, the topic is a peculiarly timely one; and those of our readers who agree with Mr. HENRY's views should not fail to put a copy of the October number into the hands of their representatives at Washington.

ANNOTATIONS AND MONOGRAPHS.

THE announcement made in the August number of THE AMERICAN LAW REGISTER AND REVIEW, in regard to the proposed substitution of several annotations in each number for the single annotation, which it has been customary to publish heretofore, has met with a very flattering reception. The full complement of assistants has almost been made up, and some of the editors-in-chief, who were spoken of a month ago as having been requested to take part in the enterprise, have definitely decided so to do. It will, therefore, be possible to make the final announcement with the completed list of editors in the October number of this periodical, and it is hoped that in the November number the plan itself may be inaugurated. The co-operation of the distinguished lawyers, who have consented to act as editors-in-chief of the various departments, will insure a high standard of excellence in the annotations and monographs. Indeed, it may be doubted whether any legal periodical has ever been able to offer to its readers brief-material, which has had the advantage of supervision and correction at the hands of such eminent specialists. The New York *Tribune* is one of the many papers which has commented favorably upon this enterprise. In the course of its remarks, the *Tribune* says: "The enterprise is an interesting one, and shows how greatly the old magazines feel the need of some new attraction to replace the printing of individual decisions which is now made unnecessary by the quick publication of reports after the decisions are rendered."

A portion of the plan outlined in the August issue has been fulfilled by the publication of several of the monographs. Patterson's "Law of Contracts in Restraint of Trade," and Lewis' "Federal Power Over Commerce," have been published. Hartshorne's "Railroads and the Commerce Clause," is in press. "The Recission of Divisible Contracts," by F. H. Bohlen, Esq., is in manuscript, and others are in preparation.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

OCTOBER, 1892.

THE ADOPTION OF A UNIFORM BILL OF LADING
BY INTERNATIONAL CONFERENCE.

BY MORTON P. HENRY, ESQ.

THE subject of the adoption of a uniform bill of lading in the foreign commerce of the United States will become the subject of legislation in the next Congress.

A bill was directed to be reported favorably by the Committee on Commerce of the House of Representatives containing certain essential features which concern the great shipping interest connected with the trade of the United States. Its effect must be serious to other interests in those of the owners of shipping.

Its provisions substantially are that no bill of lading shall be issued for ocean commerce which contains any exemption of liability of the owner for negligence of their servants in navigation under the terms "care in transport" and authorizes the collectors of the port to refuse clearance to vessels when they are satisfied that bills of lading have been issued which are not in conformity with the provisions of the Act, or when the master or vessel's

agents refuse to issue bills of lading unless containing such exceptions.

The state of the law in the Federal courts in respect to this is still undefined. The rule of the Federal court which refuses to enforce an agreement for such an exemption for negligence to carriers by land was extended also to carriers by water in the case of *Liverpool & London Globe Insurance Company v. Phoenix Insurance Company*.

That case, however, did not decide the question which was attempted to be raised—*i.e.*, That such contracts when made by owners of foreign vessels in the United States for shipment to foreign ports were, in case of a conflict of law, to be enforced according to the law of the vessel's nationality or that of the country of the destination of the vessel where the voyage terminates.

In that case known as "*The Montana*" the contracts were for shipments from New York to England by an English vessel, but on the face of the contract itself it did not appear that the shippers had notice that the shipments were to be made by other than American vessels, and the rule of law was stated to be that the contract was presumably made under the law of the place (*i.e.*, of the United States), in the absence of any evidence to show that the parties contracted with reference to any other law. It was admitted that parties to a contract substantially to be performed elsewhere might frame their contract with reference to the foreign law, and that when such intention is manifest the foreign law will control the contract. It was only decided in that case as it was presented; that there was no evidence to show that the shippers had entered into the contract otherwise than as an American one, and it was therefore held to be subject solely to the rule of the American law as applied in the Federal courts, which refuses to recognize the validity of the exception from negligence in navigation which was found to have caused the loss.

The same question precisely came before the English Court of Appeals, which withheld the delivery of its judg-

¹ 129 U.S., 397.

ment until the case had been passed upon by the Supreme Court of the United States. That Court came to a precisely different result; holding that when the terms of such a contract of shipment to a foreign country contained stipulations which were valid according to the law of the place of destination and were otherwise under that of the place of contract or shipment, the parties were presumed to have contracted in reference to the law of the place of ultimate destination and not to that of the place of contract. This was the case *in re Missouri*.¹

It is to be observed that in neither of these cases did the courts regard the fact that the shipments were made by a foreign vessel as one materially affecting the result.

The Supreme Court considered it a question not before the Court and reserved any opinion as to what their judgment would have been if the shipper had known that the contract was for transportation by an English vessel. The English Court of Appeals while adverting to the fact of the shipment being made by an English vessel does not seem to have considered that circumstance to be one which materially affected their judgment.

The attempt of text-book writers² to treat the law of the nation of a carrying vessel as that which presumably controls contracts of transportation by vessel, where a conflict of law arises, received very little countenance in these cases.³ Such a rule has been very properly applied in cases of marine disaster, where exceptional duties to the owners of the cargo, arising out of the law of agency created by necessity, are thrown upon the master; but there seems to be very little ground for applying it to contracts made by the owners themselves. Such contracts made at foreign ports are usually entered into by agents, who practically represent the owners themselves. The

¹ 42 Ch. Div., 320.

² Carver on Carriage by Sea, S. 200. *Machlachlan Merch. Shipping*, p. 161 (2 ed.).

³ Although supported by the words of WILLES, J., in his opinion delivered in *Lloyd v. Guibert*, L. R. 1, Q. B. 115.

powers and duties of such agents are defined by the ordinary law of agency; their contracts are construed in case of the conflict of laws in the same manner as if the owner was present and acting in person.

While in the case of maritime disaster, when the master becomes the agent *ex necessitate* of the owners of the cargo to preserve their interests, the only rule of conduct which the master of the vessel can safely follow in relation to the cargo, is that directed by the law of the vessel's nation, which he is presumed to know,¹ no reason appears to exist for the application to contracts for carriage by sea made by the owners themselves or their resident agent in foreign countries of any rule other than the usual one as to the enforcement of all contracts in case of a conflict of laws.

As it appears that the rules of all the maritime nations, whose vessels are the principal carriers in the foreign trade of the United States, permit such exemption for negligence in navigation, provided the vessel is seaworthy for the purposes of the voyage, which state of seaworthiness includes the furnishing of a competent master and crew; it is not probable that if the validity of such contracts is supported when made by owners of foreign ships that the same claim of exemption from liability will be refused by American courts in contracts made by owners of American vessels; otherwise such American vessels would be employed at a disadvantage in competition with foreign-owned vessels in the trade of the United States and elsewhere, as the party suffering loss will follow and enforce his claim against the vessel in her home port where the law is most favorable for the shipper.

Since the bills of lading which were the subject of the case of "The Montana" were issued, a form of bill of lading for the Atlantic foreign trade of the United States has been adopted and put into effect. It is known as "The Produce Exchange Bill of Lading," and it contains

¹ The *Gaetano and Maria*, 7 Prob. Div., 137. *Lloyd v. Guibert ante*. The *Woodland*, 14; *Blatch*, 499.

a similar exemption from "liability for loss occasioned by the negligence of the master and mariner and other servants of the shipowner in navigation, provided such damage is not caused by the fault of the shipowners or the ship's husband or manager." This bill of lading was prepared by a committee representing the steamship lines trading out of New York and of the Produce Exchange of New York. It was in effect at the time when that cause was argued, although adopted after the bills of lading in the case of the *Montana* were issued, but the attention of the Court was not called to it. It was completed after much consultation and deliberation. Each of the clauses was carefully considered before final adoption. It received also the formal approval of the Produce Exchange at Chicago. This form of contract is adopted in the through bill of lading, issued by the Trunk Lines for shipments from interior points in the United States to Europe, in that part relating to the ocean transport.¹

Previously to the adoption of this bill of lading the contracts of carriers by sea were such as each chose to adopt for itself. They had grown to be long and cumbersome documents and contained many clauses which were objectionable to the shippers, and they were drawn in reference to the laws of different nations and the customs of different ports. The Society for the Codification of the Law of Nations has taken up the subject, and in 1887, at a meeting of the association in London, adopted a resolution as follows :

"That the principle of the common form of bill of lading should be this : That the shipowner, whether by steam or sailing ship, should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage, such as the stowage and right delivery of the cargo and other matters of this kind; but, on the other hand, the shipowner should be exempt from liability for everything which comes under the head of 'accidents of navigation,' even though the loss from these may be in-

¹ Report of The American Bar Association for 1889, p. 339.

directly attributable to some fault or neglect of the crew."

The form, finally adopted by the committee referred to, has the merit of simplicity and precision of language in the various clauses.

The Produce Exchange Bill of Lading is in accord with that recommended; it is believed to have successfully stood the scrutiny of the trade for upward of eight years. In adopting this bill of lading both sides were represented by competent persons, and it was conceded that the rule of the maritime nations allowing exemption for negligence in navigation, was one which should be conceded the owners of vessels who could not control or remove their agents after a voyage is commenced. In this respect the shipowner is unlike the carrier by land. Navigation is necessarily conducted by the owner's agents in his absence. It is to be remembered, also, that questions as to the liability of sea carriers are almost always between the latter and the underwriters of cargo, who, through the different boards of surveyors, know the grade of the vessels whose cargoes they insure. Whatever may be the protection which the owner of cargo can obtain from the liability of the ship owner, he, nevertheless, habitually insures; he looks for immediate indemnity for any loss which may be consequent on the peril of the sea to his insurers who are liable, directly to him, for a loss by sea damage, although such loss was incurred by reason of the fault of the shipowner's servants. The claims on the ship owners will, almost universally, be found to be those by the underwriters of cargo, arising out of substitution to that of the shipper on the payment of the insured loss by the insurers, who, of late years, attempt to obtain indemnity from the ship owner for a part of the risk—which they are paid to assume. And the real question as to losses arising from negligence in navigation by the shipowner's servants is, whether they are such as should be borne by the underwriters or by the shipowner.

The rule which forbids the common carrier by land in the United States to contract for exemption from liability for the negligence of his servants, is put on the ground of

public policy. Public policy would seem to be a very unstable ground for the courts to stand upon. "It is a very unruly horse, and when you once get astride of it, you never know where it will carry you."¹

Like the rule of "sound decrction," it is one, which the late Mr. Justice GRIER aptly said, was more fit for the Hall of the Cadi than for the judgment-seat of the Court.²

The circumstances under which the Produce Exchange Bill of Lading for sea transportation was adopted, would seem to exclude any such ruling as that it is a document which the courts will refuse to enforce for reasons of public policy. No body of men could be found more competent to form a judgment as to the good policy of allowing such exemption to carriers than that which gave its assent to this form of bill of lading, which casts the burden of all losses by sea peril, in case of a seaworthy vessel, furnished with a competent crew, upon the insurers of the cargo on board of the vessel. Considerations of the highest policy would require the courts to sustain and support the validity of this exception. A shipowner, whether a common carrier or otherwise, is a volunteer in the sense that he can retire from the business, or any particular trade, at his will. A corporation of shipowners, unlike that owning a railroad, holds no duty to the public, except as long as it may be to its interest to serve the same. The shipowner, therefore, must be indemnified against any increased risks by an increase in rates of freight; and every rule of contract, which increases the liability of the shipowner, eventually works to the disadvantage of the exporter from the United States, wherever he comes in competition with exporters of other countries. The bill introduced into Congress makes this risk of navigation one which the shipowners cannot escape by contract, and a liability which he must assume even in relief of the insurers of the shipper. It is impossible that this insistence on an extreme liability, from which, in other trades, the

¹ Burroughs in *Richardson v. Mellish*, 2 Bing., 242-9, etc.

² *The Conestoga*, 2 Wall. Jr., 124.

vessels are exempt, will not affect the employment of vessels in the export trade of the United States. Vessel owners necessarily would give preference to charter parties for the employment of their vessels in those trades where their liability would be less than that of the United States. It is impossible to believe that the large and intelligent class of shipowners, represented as they now are by protective associations which carefully scan their contracts by charter party, will not discriminate in favor of the employment of their vessels in other trades, than in that of the United States. So that it would work to the disadvantage of the shippers of produce from this country, and in favor of their competitors in trade in the exportation of grains and provisions from Australia, India and the Black Sea.

In the report of the Committee of the House of Representatives a stricture was made in emphatic terms on clauses in the bills of lading which had reference to the foreign law. The through bill of lading was drawn so as to be adapted to shipments by vessels of different nationalities after arrival at the port of shipment in the United States. The English shipowners contended that the contract would be governed as to British vessels by what is termed as the law of the flag. The owners of the lines of steamers to the continent of Europe and of the few American vessels in the foreign trade thought that it would be governed by the law of the port of destination. The two clauses were drawn with reference to this difference of view. It must have been a misconception of the subject which led to the remark that such contract was humiliating to an American citizen. That men may contract in this or any other country according to the law prevailing in the place of performance cannot be discussed. A country or court which should refuse to countenance such contracts in a proper case would make commercial intercourse so difficult as to restrict it to the narrowest limits, and one of the most enlightened branches of the law—namely, that of the Conflict of Laws, which is the private international law of

the world—would cease to be a part of the commercial law of the United States.¹

A mistaken opinion is expressed in the report of the Committee in favor of the bill, when it says that the carrying trade of the United States is a monopoly in the hands of certain corporations of shipowners. The most superficial examination will show that the carrying trade of the world is principally done by that class of vessels designated as tramps, which do not trade from any one country or port. The vessels whose names are most familiar to the public derive their principal business from their passenger trade. The carrying capacity of the swift steamers is small, and is only an adjunct to their other business. The real carriers are the tramps, which are bound to no line, and have no connection with any particular ports. They seek business wherever its conditions are most profitable. It is the competition for the trade of the United States by these vessels, which keeps down the rates of freight. Business relations, other than the carrying of freight, may compel the owners of the principal steam lines to continue their business, notwithstanding the increased burden which this Act of Congress would put upon them in their freighting business. The ordinary freighting vessel would seek employment in the ports of those countries where the conditions of the contract of carriage are least onerous.

The result, therefore, of such legislation is adverse to the American farmer and planter wherever he comes in competition with foreign producers for the trade of the world.

The power given to the collectors of the port to deny clearance to vessels wherever in the opinion of such collectors the bills of lading issued are not in conformity with the provisions of the Act, reposes a power in those officials

¹ A most emphatic statement of the duty of courts to enforce the foreign law, not of comity but of right, will be found in the opinion of Judge CHRISTIANCY, in *Thompson v. Waters*, 25 Mich., 214; see also Wharton's "Conflict of Laws," Sec. 1.

which the owners of no other class of property would voluntarily subject themselves to.

It would entail a very heavy responsibility on these officers and their bondsmen, and it is a power over others so great and so capable of abuse as cannot safely be trusted to officials of any grade.

Contracts of carriage by sea cannot be made entirely uniform for every trade. There must always be certain variations in the contracts of affreightment of vessels whose destination is to different countries, and a different form of contract will be found to exist for shipment of ores, fruits, oil, grain and cotton. In the various clauses which must be introduced in charter parties of vessels having reference to the trade in which they are employed, it would not be difficult to find clauses, the terms of which might be considered inconsistent with provisions of the Act. The terms of the bill of lading must conform with the contract of the charter parties. Such contracts are made months ahead of the arrival of the vessels in this country and while they are in distant seas. By far the largest part of the trade of the United States to Europe is conducted under such charter parties, which to a certain extent are speculative in their character. By such charter parties so effected the charterer or hirer of the whole capacity of the vessel contracts with the shipper, and the master can sign no bill of lading except in conformity with those charters which uniformly contain this exception of liability.¹ Difficulties must result from the attempt to attach to the trade of this country the provisions of an Act which applies solely to this country, accompanied by a provision so stringent as that which allows a collector of a port to detain a loaded vessel and possibly break up a voyage for want of compliance with the terms of this Act. Trade is said to be like the sensitive plant, "touch it and it shrinks, press it and it dies." Even difficult port regulations militate against the trade of the port which impose them. What injury to the

¹ *Gracie v. Palmer*, 8 Wheat, 605; *Rodomachi v. Milburn*, 17, 2 B. Div., p. 316.

trade of the United States may not be anticipated from the objections of shipowners to subjecting their vessel property to the control of a collector of a port, who has the right to construe the contract of a vessel's bill of lading and to enforce his views by denying a clearance to the vessel whenever in his opinion the bill of lading is not consistent with the provisions of this Act? Delay in the clearance of the vessel may defeat contracts of sale based upon monthly shipments, and the liability which the shipowner will incur may be extreme.

For these reasons it appears inadvisable that such restraint on the power of contract in the foreign carrying trade of the United States should be imposed by legislation without a general concurrence on the part of other nations; and it seems only reasonable that the interpretation and enforcement of such contracts should be left to the courts alone until some general agreement shall be arrived at by international conference leading to the adoption of a uniform limit of liability of vessel owners in contracts of carriage by sea.

The subject is as important as that of the rules of the road which led to the conference at Washington of representatives of all maritime nations, where uniformity in sailing rules was adopted. The liability of carriers for the sea risk should be uniform in all trades using the pathway of the sea. Restriction of the freedom of contract or imposition of liability upon carriers in the trade of one single nation will inevitably be detrimental in its results to the interest of that nation.

PHILADELPHIA PA.

AMERICAN JURISPRUDENCE.¹

BY SIMON E. BALDWIN, LL.D.

As we enter on the fifth century of American history we are preparing to show the world, at Chicago, whatever of the best results of our industry and invention can be put into visible form. But how little of a nation's achievements can be thus set forth! The currents of thought, the way of looking at things, the way of putting things, the drift of opinion, the growth of institutions, that individualize the character of a people, cannot be boxed up and shipped to Chicago. The Columbian Exposition may tell of the material side of American civilization, but its real life and spirit must be sought elsewhere, and can perhaps only be understood in their full depth by those who feel them a part of their own existence.

The truest gauge of a nation's civilization is its system of jurisprudence. If there has been built upon our soil a system of American jurisprudence, it has been mainly the work of American lawyers, and its characteristics can nowhere be better studied or appreciated than in an association like this.

The name of American may belong, by geographic right, to every dweller on this continent; but the generation of which we are citizens has made it, by right of history and conquest—conquest, I mean, by predominance in arts and learning, in literature and commerce—especially her own. It is, then, to the jurisprudence of the United States, and of the States of which it is composed, that I ask your attention.

The great stretch of territory to the north of us is under the dependency of a distant government, and looks for leadership there. Our sister republics to the southward have been content, for the most part, to follow the lines of the Roman law. But to us, the spirit of independence has

¹ An address delivered before the Ohio State Bar Association, July 1, 1892.

so early to give life and character to forms of government and judicial establishments, brought with it a transmuting power. Latin civilization had lent color to the south and southwest. The Dutch had brought something of it, and more of their own rugged republicanism, to New York. The Puritans had learned in Holland much which they afterwards put into the institutions of New England. But it is not what we owe to Spain, or France, or Holland, that has made American so different from English jurisprudence. The nation that has governed itself for more than a century, that has within it States which have governed themselves for more than two centuries, does not but have a law and life peculiar to itself, the fruit of the soil on which they grew.

It has been said that there is a Great Britain and a Water Britain. But no one land can now be called our mother country. Time was when Boston and Philadelphia might well give that name to England, and New Orleans to St. Louis to France; but in the time that is, when, if we count by nationalities, there are few cities in Germany containing more of German birth than do New York or Cincinnati, and few in Norway with a Norse population than that of some of our Northwestern towns; when the east half of Ireland is in America; when the face and language of the Italian and Hungarian have become familiar in our streets, we may say with CICERO that we have ourselves commenced our line of ancestry. There is to arise, HERBERT SPENCER tells us, from the mixture of these varied varieties of the Aryan race, a finer type of man than hitherto existed—a type more plastic, more capable of the modifications needed for the completer social life that is to come. For this new race we are to prepare the way; and those who went before us have prepared it by the foundation of a broader and humaner jurisprudence.

Into the law of nations we of America have introduced the principle of voluntary expatriation. It is, indeed, the condition of our existence. The doctrine of perpetual allegiance was undisputed in the Old World. Its

application to Americans by the British Crown was one of the grievances recited in the Declaration of Independence, but we ourselves asserted its obligation long after independence had been achieved.

JEREMIAH MASON once said that the development of an American jurisprudence could only be looked for from the courts of the National Government. Upon this question, however, it was a court of a State, that of Pennsylvania,¹ which, following the language of her constitution framed by FRANKLIN, first declared expatriation an original and indefeasible right of man; and this at a time when those of the United States adhered to the rules of the common law.² Thus it was left to Congress to affirm by statute the American principle, as soon as the nation felt strong enough to assert it against the world,³ and treaties which have been made, in pursuance of this declaration, have now obtained its recognition in almost every country that can call itself civilized. This new rule of American jurisprudence is the work of the Bar, rather than the Courts. Its earliest supporters were ADAMS and JEFFERSON, and to our attorney generals and the great lawyers who, from time to time, have had the direction of the Department of State, we owe especially its international authority.

For ourselves, also, we have changed the law of nations as to treaty obligations, in its fundamental conception. Treaties are not for us mere contracts, with no other sanction than the military power of the other government. The Constitution of the United States has raised them to the position of the supreme law of the land, as binding as an Act of Congress in every American court.

Passing from the relations of States to States, to those of the State to its own citizens, we find a distinctive American system of criminal procedure. We have viewed the punishment of crime from a new standpoint, that

¹ *Murray v. McCarthy*, 2 Munf. 393.

² *Williams' Case*, Wharton's State Trials, 652.

³ U. S. Revised Statutes, 1909; Act of 1868.

the reformer. Nine-tenths of those who in England a hundred years ago, would have been hanged, have been here instead condemned to labor for a term of years in what we have named, with kindly hope, a penitentiary. Pennsylvania was the first of civilized communities to inaugurate this change, under her Constitution of 1776.¹ Reformatories for young offenders, also, are distinctively an American innovation.

It is difficult for men of our day to believe how much of "man's inhumanity to man" was shown in the criminal law of England, when the institutions of this country first took shape. The common law was rigorous enough, but in the days of the Stuarts and the Georges the number of capital offenses was increased by nearly two hundred. It was not until the beginning of this century that hanging ceased to be the punishment of a pickpocket. To arrest a man on a charge of crime was almost equivalent to a conviction, for he could produce no witnesses in his own behalf, nor have counsel to plead his cause. It makes one's blood boil in his veins to read one of the shorthand reports of the state trials of the seventeenth century; such, for instance, as that of Stephen College, at Oxford. If a conviction did not lead to the gibbet, the criminal was either transported or turned loose on the community after some mark of bodily degradation, perhaps with his ears cropped, or a hand struck off, to fix the memory of his shame upon him as long as life should last. Degrees of punishment for the greater crimes were marked simply by the degrees of barbarity with which the wretch was executed. Hanging, was, indeed, a mild penalty, when compared with burning, quartering and disemboweling.²

Not until the great popular movement which found voice in the Reform Bill, and has made England more of a democracy than the United States, were these cruelties

¹ 2 Poore's Charters and Constitutions, 1547.

² For a development of the subject of the English Criminal Laws, see the paper by Hampton L. Carson, Esq., in the June number (1892) of this periodical.—ED.

swept away from English law. But in guarding against their presence here, American jurisprudence may have gone too far. To forbid the examination of the accused by torture, or under any form of compulsion, was right; but was it necessary to forbid the committing magistrate to ask him anything, except whether he admits or denies the charge? I believe we have put the State at a disadvantage in preventing it from calling upon the prisoner to give an account of the transaction out of which the charge arose—to tell his own story in his own way, knowing that whatever he says may be used against him on the trial. And is there a reason which is really good for giving the convicted an appeal to our highest courts on the most trivial points of law, when the rights of the public are generally determined finally by the trial judge? It is this over-kindness to the individual, to the prejudice of the state, which renders possible, and, as many say, defensible, such things as the killing of the Italians at New Orleans, and the lynch-law executions that in some of our States outnumber every year those had pursuant to the sentence of the courts.

In one respect our criminal law is, perhaps, less favorable to the accused than was that of England. We adopted early the Continental method of prosecutions by public officers, instead of leaving them to be brought or dropped according to the dictates of personal feeling, or the desire for pecuniary reparation.

The strength and value of government by party have led us to place party conventions under the protection of the criminal laws. Fraud in balloting at a nominating caucus is punished in the same way as frauds at public elections. A new order of rights is recognized: those which flow from the duty of political organization; for it is the duty of every citizen to use his elective franchise in the most effective way. That way, the law feels, is through party combinations, and therefore our jurisprudence is enlarged to embrace their recognition and protection.

The law of libel, in any government, is one of the surest tests by which to estimate its hold upon the people.

The United States was the first to renounce, for its rulers, the protection of this law. When the decemvirs were framing the Twelve Tables of Rome, few as were the subjects they thought it important to cover in their code, they were careful to make libel against the State a capital offense; for they were the State, and they were turning a republic into a despotism. When the people of England were beginning to demand a greater share in her government, it was the law of libel to which the Crown resorted for its surest weapon of defense, and it was the pride of the English Bar that, in criminal cases, they nullified it by the aid of the jury. With us, to the United States, the law of libel is unknown, because it has no common law, and because the only statute ever passed by Congress to replace it, on this subject, was swept away in the first change of administration, and, indeed, in no small part was the cause of that change of administration, while in our States we have almost everywhere come to the position that, both in civil and criminal cases, truth is a justification, unless actual malice is proved.

We have ventured farther than any nation ever dared to go before in forbidding all *ex post facto* laws, and this and other guarantees of individual right we have woven into our written constitutions, so as to make them the supreme law, as unalterable as the frame of government itself.

In the same irrevocable way we have severed the relations of Church and State. The famous definition of jurisprudence given by the Roman law, that it is *divinarum atque humanarum rerum notitia, justi atque injusti scientia*, has been sharply attacked by modern critics, as confusing notions of law and religion. But in what nation, before our own, were law and religion ever separated in their relations to the State? From the first beginnings of patriarchal society the world has looked at them as coming from a common source, upheld by a common sanction, and forming parts of the same administration of government. The authority of each was deemed necessary to support the other.

First of nations, the United States, without the least reflection on religion of any form, severed the Church from the State, and freed the current of its jurisprudence from all ecclesiastical control. Nor has this mutual independence been found incompatible with restraining power over the civil courts where private rights were affected by unjust acts of those in ecclesiastical authority. In the organization of the great mother church of Christendom, the bishop has the power to remove any priest in his diocese from a parish at his discretion. An American bishop exercising this power, for what seemed to him sufficient cause, but without notice or hearing. The priest applied to the courts for redress, and it was held, in granting it, that though it might be according to the laws of that church to deprive a man of his livelihood on a charge of failure in duty, yet, as heard, it was not in accordance with the laws of the land.

The jurisprudence of most countries has been based on the conception of the rights of the State as against individuals. American jurisprudence rests equally on the rights of the citizen against the State. We believe that the State owes an active duty to its people, and that their welfare is only important as reflecting theirs.

I have spoken of our public prosecutors for wrongs against individuals. Their appointment is but one illustration of a principle of American government which demands that all business, in the well doing of which the public have an interest, shall be done by or under the inspection of a public officer, and so that the public may have a knowledge of it. This has brought a new security to landed interests. It makes it possible for any man of ordinary education to trace a land title, because the material is at his command, systematically arranged, in a public record office, not stored in some muniment chest in a castle tower, nor even buried in the files of a notary, whose position is but half official.

Our rules of civil procedure are our own. A few States may still adhere in name to the cumbrous methods

¹ O'Hara v. Slack, 90 Pa. St., 477.

English origin, but in most we have, and in all shall have, the simple rules of what, for want of a better name, we call Code Pleading. Originating in New York, not fifty years ago it has, in the lifetime of its distinguished author, DAVID DUDLEY FIELD, not only overspread a large part of our own country, but supplanted the forms of the common law in the very land of their birth.

Our attachment to the principle of personal liberty has modified the law of civil process. Insolvent debtors had been treated in most countries as a kind of criminals. America began to open their prison doors, at the area of the Revolution.¹

The law of evidence has been changed in a vital point. In no country before our own has every man been admitted as a witness in court. There have been distinctions of class, exclusions from interest, exclusions for infamy. American jurisprudence is unwilling to condemn the lowest or worst of men unheard: it is unwilling to believe that pecuniary interest necessarily leads men to forswear themselves, or to assume that every party to a suit would naturally perjure himself to get a verdict. The Roman law and the rules of English Chancery allowed you to force an oath upon your adversary, but only at the cost of making him, so to speak, your own witness. We have done more wisely, I think, in admitting testimony from all, on equal terms, leaving it for the triers to give it, in each case, such weight as it may deserve. The first statute of this kind in America was enacted in Connecticut, in 1848. Its author,² soon afterwards went abroad in the diplomatic service, and, when in England, brought it to the attention of some men of influence, through whose efforts an Act of Parliament, of a similar nature (14 & 15 Vict., chap. 99), was passed in 1851.

We have given a new character to trial by jury. The right of the jury to judge of the law we have extended to

¹ See the Constitution of Pennsylvania of 1776, art. 1, sec. 28; 2 Poore's Charters and Constitutions, p. 1546.

² Hon. Charles J. McCurdy, LL.D.

all criminal cases,¹ and the Continental plan of giving them partial control over the sentence, in case of conviction, has been extensively followed. The authority of the Court has also been weakened in civil cases, by securing greater privileges to the Bar in shaping the terms of the charge. The dangers of these changes in the jury system were forcibly portrayed, a few years ago, in a paper read before the American Bar Association by one of your guests on this occasion, Mr. Justice BROWN. This mode of trial, as it existed at common law, was well adapted to secure the rights of the masses against the classes. But it was a system of exact balances. It demanded a free and fearless judge as well as a free and fearless jury. The jury may drag the car of justice, but the judge must drive, or they will drag it to destruction. The inroads of the bar upon his prerogatives seem to me a mark of what, even here in a State that has produced great judges, I venture to term, on the whole, the degrading effects of the American plan of an elective judiciary. It indicates a distrust of the independence or the intelligence of the Court. It foreshadows the gradual extinction of the jury trial in civil causes, because that can never be permanently satisfactory unless a large discretion, not to say despotism, is left in the hands of the thirteenth man.

We have given, I cannot but think, an undue prominence to judicial precedents as a natural source or annunciation of the law. The multiplication of distinct sovereignties in the same land, each fully officered, and each publishing in official form the opinions of its courts of last resort, bewilders the American lawyer in his search for authority. The guiding principles of our law are few and plain. Their application to the matter we may have in hand it is the business of our profession to make, and if we spent more time in doing it ourselves, and less in endeavoring to find how other men had done it in other cases, we should, I believe, be better prepared to inform the Court and serve our client.

¹ For a denial of any such right to the jury, see *Comm. v. McManus*, 30 AMERICAN LAW REGISTER, 731 and the annotation thereto.—ED.

There have been lawyers bold enough to attack bad precedents in our highest Courts and to destroy them. You recollect that conspicuous instance of coming to a right decision by overturning a wrong one, which is furnished by the history of the Supreme Court of the United States.

In 1825, a libel in admiralty for seamen's wages, earned upon a steamer on the Missouri River, was dismissed for want of jurisdiction, and, on appeal, Mr. Justice STORY delivered the unanimous opinion of the Court, that admiralty furnished no remedies for services that were not rendered on tide-water. There was no better authority for this than that such had been the rule of the English Admiralty. But, a quarter of a century later, the same Court, speaking through a greater, though less learned judge, and with but one dissenting voice, reversed their position, and declared that America could not adopt the English definition, by which, in the terse phrase of the Chief Justice, "the description of a public navigable river was substituted in the place of the thing intended to be described."

This case of the *Genesee Chief*¹ is one of the half dozen decisions that stand out as the great land marks of American jurisprudence. I should put first in time that of *Marbury v. Madison*,² in which Chief Justice MARSHALL asserted the right of the Courts to declare any statute void which was in conflict with the Constitution. The second place I would assign to *Fletcher v. Peck*,³ where a private individual was protected against the revocation of a public grant. Then comes *Dartmouth College v. Woodward*,⁴ in which Chief Justice MARSHALL read into the words of the Constitution a meaning which he admitted might never have been thought of by the men who framed, or the people who ratified it. It made the subjection of the sovereign State to the performance of its obligations, at the

¹ 12 How. 455.

² 1 Cranch 137.

³ 6 Cranch 87.

⁴ 4 Wheat. 518.

command of the civil court, a rule of our jurisprudence. It brought a new theory of corporate rights into existence. If they rested on a public contract, that contract the public must perform. To *Milligan's Case*¹ we turn when we seek the limitations of individual liberty in time of war. *Cummings v. Missouri*,² for its safeguards against *ex post facto* legislation. The *Slaughter House Cases*,³ brought sharply out the distinctions between the citizen of a State and the citizen of the United States. In *Loan Association v. Topeka*,⁴ those limitations on the legislative power which are inherent in the nature of a free government, stated with telling force, in their bearing on questions of public use.

There are other decisions of the Supreme Court which are as often referred to as these, because they settle hard fought controversies over the meaning of our Constitution in its political aspects; but those that I have mentioned seem to me especially noteworthy in their bearing on the subject we have now before us—the relation of the law to the individual.

That a woman is an individual, even if she be a wife, and does not forfeit her personal identity by marriage, is another of the positions of American law. Our treatment of the property relations of husband and wife, as it is now fixed by the statutes of most of our States is almost as different from the Roman or Continental as from the English rule. Its principle is not community, but independence. The separation of property rights is but one of the innovations made by American law on what had been regarded throughout Christendom as the natural characteristics of the marriage relation.

The Church of Rome had declared marriage to be a sacrament, and indissoluble except by its authority. The Protestants of the Reformation denied this, and, under

¹ 4 Wall. 2-124.

² Ibid. 277.

³ 16 Wall. 78.

⁴ 20 Wall. 655.

Puritans, civil marriages and civil divorces were early American institutions. The gradual extension of the causes of divorce, and the gradual abbreviation of the trial of a divorce case in our courts, you are all familiar with. There have been countries before in which divorce was as free in law, but none where it has been so free in fact. For five hundred years the Roman husband could put away his wife at will, and for five hundred years only one availed himself of his right, and he was, like NAPOLEON, unwillingly driven to it by the demands of the State.

It seems to me that the number of causes of divorce recognized in American law might well be substantially reduced. Indeed, a movement in this direction has been made, which within the past twenty years has had considerable success. By the last report of the National Divorce Reform League, it appears that only three States¹ now retain the "omnibus" clause in their divorce statutes, which permits divorces for any cause satisfactory to the Court. But the evils of our divorce system lie quite as much in our method of procedure. The recent report on this subject by the Commissioner of Labor of the United States shows that a fifth of all American divorces are granted to parties who were married in some other jurisdiction. We all know how short a residence on the part of the petitioner is generally made sufficient, and on how slight a notice to a non-resident respondent, the Court proceeds. Such a notice is always dictated in the first instance by the petitioner's attorney, and his discretion in the matter is seldom revised, if he keeps within the letter of the law, however improbable it may be that the other party has in fact any knowledge of the proceeding.

So far as divorces obtained on default, upon newspaper publication, against non-residents, are concerned, I suppose the rule of jurisprudence, here and everywhere, to be that they are totally void, unless the petitioner was domiciled within the jurisdiction of the court, or the marriage was

¹ Washington, Kentucky and Rhode Island.

celebrated there. Just such American divorces have been disregarded in England and Canada, and a second marriage by the divorced party treated as bigamy.¹ The American Bar Association, ten years ago, drafted a statute to remedy this evil, by making domicile, instead of residence the test of jurisdiction. It has already been adopted in two States (Minnesota and New Hampshire), and I venture on this occasion to ask you of the Ohio Bar if your State ought not, under your advice, to place itself on the same ground.

I have sought to state only such of the leading features of American jurisprudence as are not found in other systems or not found under similar conditions. I add one of minor importance, but interesting, as the natural and spontaneous growth of the soil. It is the new rule of partnership law, by which the death of a partner in a mine does not dissolve the partnership. The rough and dangerous life of the mining camp demanded the innovation, and obtained it, at the hand of the courts, without aid from statute.

The drift of American jurisprudence is towards the expression of the law in an orderly and official form; in other words, towards codification. It has approached the question from the practical side and in a practical way. The early colonies soon put their scanty statutes into print, arranged in some convenient way for ready reference, the various heads often following each other in alphabetical order, as in our digests of reports. New York led the way towards a more systematic and comprehensive treatment of the subject, by her Revised Statutes of 1827, a revision which, though in many points revolutionary, was so well considered and well done that it has held the ground for over half a century, while in most of our States revision succeeds revision every ten or fifteen years. But there is nothing distinctively American in codification. It is simply un-English. It is the natural aim and end of every system of jurisprudence—of jurisprudence itself, apart from any particular system of it. Jurisprudence is the science of law,

¹ *Briggs v. Briggs*, L. R., 5 Prob. & Div. 163.

and the orderly statement of its rules can be called by no better name than Code.

The term "American jurisprudence" has been taken in this address as meaning the scientific conception of that system of law judicially administered within the United States—not alone the science of American law or the science of law as applied to America. It is the judicial administration of law, which, with us especially, gives it a character and vitality of its own.

It was a true and profound remark of DE TOCQUEVILLE that the extension of judicial power in the political world ought to be in the exact ratio of the extension of elective offices; for if these two institutions do not go hand in hand the State must fall into anarchy or into subjection.

Our country courts, our justices of the peace, with combined administrative and judicial functions, our judge-made law, our constitutions, as interpreted and expanded from the Bench into something far wiser and better than their builders knew, these, quite as much as our printed statute books, are the sources and safeguards of our rights and liberties.

There are few countries where the removal of public officials is as difficult, often as impossible, as with us. There is no country where the power of the courts to direct their action and to punish their misconduct is as great. Nor is it the executive office only which is thus amenable to judicial control. The subjection of the Legislature to written rules, enforceable by the courts, is a feature peculiar to American jurisprudence.

The honor of framing the first written constitution of government which deserves that name, belongs, I believe, to the early settlers on the banks of the Connecticut; but it was not till another century that we find the judiciary recognized as the guardians of constitutions, and, as such, the superiors of the Legislature.

The occasional and peaceful exercise of the active sovereignty of the people in direct legislation is an American idea.

In our constitutional conventions they resume, at long intervals, for a few weeks' time, their delegated powers, and re-found the State. Conventions of the people, national assemblies, are common enough in history, but their work has been, or come to be, that of revolution. Our sister republic, France, has not ventured to follow us in trusting the people with this great power, and in waiting for them to act, whatever the emergency may be. Her plan is that if each house of the Legislature deems a revision of the Constitution necessary, they may meet at once in joint assembly and effect it by a bare majority.¹

This system of American jurisprudence, whose lines I have tried to trace, is the living voice of the American Bar—of the American Bar of many generations. The spoken word, uttered by a THOMAS LECHFORD, or JAMES OTIS, or PATRICK HENRY, or JOHN MARSHALL, in other days, may be forgotten. But, if it stirred men's hearts; if it sank into men's minds; if it carried conviction; if it was the foundation of verdicts, and judgments, and statutes, the circle of its influence is widening still.

There are those who tell us that all that is said on earth, when it dies to the human ear, floats on, upon the wings of air, to remain forever a witness for or against us in the life beyond. It may be so; but whether physical force be or be not eternal and inextinguishable, it is so that the influence of human thought in the development of institutions will last as long as the history of civilization.

The science of American jurisprudence is just beginning to crystallize into form. The new race, whose character it speaks, is still but half developed.

To most of us the days pass all too swiftly in the common routine of the office and court-room; and as we are advising our clients or advocating their causes, we hardly feel that we are doing anything which can outlive the occasion that calls it forth. But the consultation, the argument, the opinion, by which the conduct of men, the

¹ *Lois Constitutionnelles*, Feb. 25, 1875, Sec. 8.

disposition of controversies or their prevention, is determined, have an influence wider than we think. These are the materials from which is being built up, by slow and imperceptible accretion, a new jurisprudence. The philosophy of the law must be founded on the practice of the law. Wiser men than we may be the ones to trace out the succession and growth of general ideas, to formulate propositions, to array conclusions in scientific arrangement; but, after all, what they give is only form. The substance was our work—the work of the plain average American lawyer. It is a monument, like the great pyramid, to perpetuate, not the names of those who made it, but, what is better, their work; and, better still, it is not to perpetuate all their work, but only what was best in it.

It has been finely said by one of the first of living American jurists, Judge OLIVER WENDELL HOLMES, JR., that, "The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society." This work in America began with the first beginnings of its history, and will continue till it ends. It has had at times the stamp of individuality. It has called no man master. It has never copied where it served its purpose better to originate. It struck out primogeniture because it believed an equal distribution of property the best foundation of republican government. It forced every deed on record, without respect to feelings of family pride. It brought justice within the reach of every man by a system of county courts and magistracies, under which the judge comes to meet the parties, instead of forcing them to travel to the seat of government. It is now perplexing the National judiciary as they are called on to declare the limits of public management of private property.

Must a man, whose business has been established under one law, submit, uncompensated, to its destruction by another? Can a State demand of its railroads that they shall reduce their fares or freight-charges so low as to pre-

clude a dividend upon their stock? Can it require them to build new stations, or reconstruct their roadbed, with no regard to their financial ability? Is the police power of a State susceptible of legal definition—that is, to legal restraint? Such questions are now dividing the Supreme Court of the United States. They are peculiar to our system of government. They illustrate its merits and defects. They are but the latest instances of a long series of great judicial problems which have arisen under our institutions, and which could have arisen nowhere else. For the first of the series we may look back to the very beginning of colonial records.

We need not be surprised that American jurisprudence should have taken, so early, a trend and aspect of its own.

The general circulation of ideas, the general diffusion of knowledge, that was rendered possible by the invention of printing, was not rendered practicable until books became so plenty as to be cheap, and instead of being published in Latin, were given to the common people in their own language. This time came to England about three hundred years ago. The Elizabethan age was a creative age in literature and philosophy, and the English, who planted our first colonies came here under the influence of its inspiration. Their business was to found governments; their literature was statute law; their gathering-place, if not the church, was the courtroom or the town meeting. Such men, thrown upon their own resources, under new conditions of society, could not fail to make a better law for themselves than they could find anywhere, whether in use or in history.

The political and commercial differences between the English Colonies and England, which showed themselves as soon as property began to accumulate here, and which culminated in our independence, kept alive this spirit of free inquiry into the reason and causes of things.

The repellent influences of the Revolution taught us to look more to the Continent for our examples. MONTESQUIEU'S *Esprit des Loïs*, published about the middle of

the last century, had a profound effect throughout America. The same may be said of BECCARIA'S work on Crimes and Punishments, which appeared twenty years later. Then came the French alliance, and the French ideas that JEFFERSON and FRANKLIN brought home from a long residence abroad. And from those days to these, not only have Americans been familiar with what comparative jurisprudence has to teach, but they themselves have been growing more and more into a new, composite nationality, the roots of which strike back into every land whose institutions are in symyathy with the spirit of modern civilization.

Our system of jurisprudence has been built up during an era of ever-increasing power and prosperity—the glad youth of a new race. It has served us well so far. Will it be found equally adapted to those other days that are sure to come, when a denser population will crowd the land; when immigration is discouraged or repelled; when there are no more virgin forests or virgin fields; when, perhaps, the growing duties of the General Government give it a still greater weight, relatively to the States? So far as we can forecast this future, it may, I believe, be our hope and our confidence that the forces of universal education, and of universal suffrage, bringing individual responsibility, will be found equal to the strain.

The American race has built up an American jurisprudence. It knows its value. It will modify it, as new conditions arise, but it will never surrender its essential characteristics, its spirit of self-reliance, its principle of equal, even-handed justice to all.

NEW HAVEN, CONN.

SUPREME COURT OF VIRGINIA.

THOMAS' ADMR. v. LEWIS, *et al.*

SYLLABUS.

Donatis Mortis Causa—Delivery—Evidence.

In a suit to establish a gift *mortis causa* it was held (1) that the fact that the donor disposed of his entire personal estate, provided there was specific delivery of the subject matter, could not be urged as an objection to a decree establishing the gift; (2) the delivery of the keys of a box, containing stocks, bonds, securities, etc., representing a value of \$200,000, was sufficient to uphold a gift "of the contents of the box;" (3) but that the delivery of a pass-book on a bank, showing a balance in the donor's favor of \$18,000, was insufficient to sustain a gift of that fund.

The facts are sufficiently stated in the opinion of the Court.

Guy & Gilliam, Staples & Munford, Green & Miller, Peatross & Harris, Wm. J. Robertson, and G. W. Hansbrough, for appellant. Edmund Waddill, Jr., Christian & Christian, Edgar Allen, W. W. Gordon, and E. C. Burks, for appellees.

OPINION OF THE COURT.

FAUNTLEROY, J.¹ The petition of Legh R. Page, administrator of William A. Thomas, deceased, represents that on the 4th of January, 1889, the said William A. Thomas died intestate, leaving an estate valued at some \$225,000, of which some \$20,000 was realty, \$18,000 on deposit in the Planters' National Bank of Richmond, and the balance, represented by bonds, stocks, choses in action, and gold coin, deposited in a rented box in the vaults of the said bank. That on the 14th day of January, 1889, the county court of Henrico County, on the motion of the heirs at law of the said decedent, appointed William R. Quarles and Mann S. Quarles curators of the said estate, who immediately qualified as such by giving bond in the penalty of \$300,000, and entered upon the discharge of their duties. That on the 29th day of January, 1889, said

¹ A portion of the opinion has been omitted.

Bettie Lewis, along with her husband, filed her bill in the chancery court of the city of Richmond, against the aforesaid curators, in which she asserted that said William A. Thomas, deceased, during his last illness, by gift *causa mortis*, gave her the keys to the tin box in the vault of the Planters' National Bank above described, and with them all the property contained therein. That he gave her the pass-book showing the *status* of his account with said Planters' Bank for money placed on deposit therein, and with it gave to her the balance on deposit to his credit in said bank, amounting as aforesaid to some \$18,000; and that he also gave to her several negotiable notes, aggregating less than \$1,000, which he had with him at his residence at the time of his last illness. That to this bill the curators filed their joint demurrer and answer, denying the claim asserted by said Bettie Lewis; denying that said Thomas had attempted during his last illness to make a gift to the plaintiff of said property; and insisting that actual possession of the several subjects of this pretended donation had never come to or remained with the plaintiff; and that no possession, either actual or constructive, by her, at the joint residence of the donor and donee, could render valid the alleged gift, the same not being evidenced by deed or will. That on the 19th day of February, 1889, petitioner, Legh R. Page, was appointed administrator of the estate of said William A. Thomas, deceased, by the county court of Henrico County, and, as such, he filed his answer to the bill of said Bettie Lewis. Before the assets in the hands of the curators aforesaid could be turned over to petitioner, the chancery court of the city of Richmond, on the motion of Bettie Lewis, appointed N. W. Bowe and I. A. Coke receivers, to take charge of and hold of all the aforesaid assets, pending a decision of the questions raised by the suit aforesaid. After the appointment of the aforesaid receivers, depositions were taken by both Plaintiff and defendants, and the case made ready for a hearing at the June term, 1890, of the chancery court. The cause was argued, elaborately and exhaustively, before the Honorable

E. H. FITZHUGH, the judge of the said court. No decree was, however, rendered by him, he having unexpectedly and suddenly died before the next term of his court. The Honorable W. J. LEAKE having been appointed his successor, the cause was again argued, at great length, before him; and on the 8th day of January, 1891, a decree was pronounced by him, sustaining the claim of the said Bettie Lewis (as preferred in her bill) to all the personal estate of the said William A. Thomas, deceased, except the sum of \$18,000, money on deposit in the Planters' National Bank, which was awarded to petitioner, as administrator aforesaid. From this decree the case is here on appeal.

The question raised in the controversy, and to be decided by this Court, is, what constitutes a valid gift *causa mortis*? and whether the evidence adduced by the complainant comes up to the law's requirements to establish such a gift by the decedent, William A. Thomas, to the complainant, Bettie Thomas Lewis, by and through the facts and circumstances detailed in the bill and attested by the proofs. It is essential to a correct and just estimate of the facts of the case, as disclosed by the record, that they be viewed in the light of the history and relations of the parties to the controversy, the congruities of the case, and the legal weight of the testimony.

The witness, Fannie Coles, says: "Mr. Thomas called Bettie to his bedside, and said, 'Bettie, I am a very sick man, I do not know what may happen;' and he said, 'Bettie, look into my pants' pocket and bring me my keys, my penknives, my two purses, and look in the inside of my vest pocket and bring me a package of papers tied with a red string.' She brought them to his bed to him, and he said, 'Bettie, I am going to give you these things as yours.'" He gave her the keys to his top bureau drawer, and told her that in that drawer she would find two notes in a white envelope; to get these notes out of the drawer—that they were hers. Then he opened a small black purse and took out a small package of white tissue paper. Out of this paper he took some keys, and he said, 'Bettie, here

are the keys to my safe at Drewry & Co.'s, and to the box I have in the vault of the bank.' He says, 'At Drewry & Co.'s, in the safe, you will not find anything of any great value, but whatever you find in that safe you can have. Now, Bettie, these keys that I now give you that belong to the box in the vault at the bank is where all my valuables are. Whatever you find in that box you can have as yours; and, Bettie, whatever you do, don't let anyone get these keys away from you on any pretence. Swing on to them as you would your life.' Then he took up his pocket-book, and gave it to her, and told her it had no great amount in the pocket-book, but that it was her's. Then he took up the package of papers that was tied with a red string, and he said, 'Bettie, in this package you will find my bank-book, showing you how much I have in bank. Whatever it calls for you can have as yours, and in this package, also, you will find some notes. They will be money for you; you can have them also. Bettie, I wish you to take these papers, my purses, and my knives—I give you these also—and put them in your trunk. I don't want you to put them in my bureau, but put them between your clothes for safe-keeping; for, Bettie, you will have to take care of these things now. I have been taking care of them all these years for you.' "

As to what occurred on the afternoon of Friday, the next day, after Mr. Gilliam left, the witness further testified: "I went up stairs after seeing the gentleman (Mr. Gilliam) out, that Dr. McGuire sent up, and knocked at Mr. Thomas' door. Mr. Thomas spoke, and said: 'Come in, Fannie,' and said, 'Take a seat.' I said, 'No, sir; I thank you. I don't care about sitting down.' He said, 'Fannie, take that chair there by the table.' I said, 'No, sir; I don't care about sitting down.' He said, 'Take that seat;' and I sat down. In a minute or so a servant knocked at the door, and said, 'Miss Bettie, I have everything all ready for you now.' Bettie said to him, 'Father, won't you have some lunch now? It is time you were eating something, as the doctor said you must eat all you can.'

She turned to me, and said, 'Fannie, go down stairs, and bring something nice up here for father's lunch.' He turned to me and said, 'Fanny, keep your seat until I tell you to go,' and he said to Bettie, 'I have something more important to do than to eat, now.' Then he said to Bettie, 'Where are those things I gave you last night?' and he said, 'I hope you have got them where I told you to put them, safe under lock and key.' Bettie told him, 'Yes, sir; she had; they were safe.' And he asked, 'Where were they?' and she told him they were safe. And he told her to go and get them, and bring them to him. She turned to get them, and instead of putting them in her trunk, where he had told her the night before, she had dropped them in his bureau drawer. And he got very angry with her for putting them in his bureau drawer, and said to her, 'Look here, now, Bettie, you had better do as I tell you about these things I have given you, for your very life hangs on them, and the bread you eat.' Bettie brought the things, and laid them on the table in front of him, and he turned to her, and he said, 'Bettie, where is that white envelope with those two notes in it; get it out of the drawer, and hand that here also.' Then he asked her and said, 'Bettie, where is your trunk at?' She said, 'In my room, behind the door.' He said, 'Now, Bettie, I want you to do for once in your life just as I tell you about these things.' Then he took the package of papers with the red string round, untied it, and he said, 'Bettie, I want to show these to you, and show you the importance of taking care of them.' He untied the envelope, and took out his bank-book, and he says, 'Bettie, here is my bank-book, which shows you exactly how much I have in bank. I give you this book, and whatever it calls for you will find in the bank, and you can have the money.' Then he laid the bank-book on the table, and took the notes out of the large envelope, and he says, 'Bettie, here's some notes which will be money for you also.' Then he picked up that white envelope, and said, 'There are two notes in here which will be money for you also. I give these also.'

Then he laid his hands on them, and said, 'Bettie, these are yours, and you will have to take care of them.' Then he picked up a red pocket-book, and he said, 'Bettie, here's my pocket-book. You will find a little change in it. Here, take it, keep it, and take good care of it,' and laid it with the rest of his papers. Then he picked up his little black purse, and he says, 'Bettie, what I am going to give you now is of great importance and very valuable. And he undid this little black purse, and took out the keys, and said, 'Bettie, these keys belong to the safe at Drewry & Co.'s, and these which I hold in my hand,' he says, 'belong to the box which I have in the vault in the bank where all my valuables are.' He says, 'These keys open the safe at Drewry & Co.'s. You won't find anything of any great value in this safe, but what you find in there you can have, it is yours.' He then handed her the keys of the safe, and says, 'Now, Bettie, these keys I now give you are where all my bonds, deeds and valuable papers are.' He said, 'Bettie, these keys I want you to swing on to as you would your life. Don't let anybody get them away from you on any pretence. In that box, Bettie, in the vault, you will find everything valuable I possess in this world. Whatever you find, Bettie, you can have, it is yours.' Then he handed her those keys, and handed her the purse, and told her to be very careful to wrap those keys up in tissue paper as she found them. Then he gave her his penknives, and said that he set great store by them, and told her not to give them away to anybody, and to be careful not to let anybody steal them from her. Then he turned and tied these papers all together. He took the two purses, and slipped them together between the red string, and handed them to Bettie; and I was sitting by the table, as I first told you, and he said to her, 'Bettie, I have given you everything I possessed in the world.' Then he said to me, 'Fannie, you see me give Bettie these things?' I said, 'Yes, sir.' Then he said to her, 'Bettie, you will have these things to take care of.' He said, 'Bettie, I am a sick man, and I don't know what may happen to me, and

I have been taking care of these things all my life; and, Bettie, you know how careful I am about my papers and keys; now you will have to do the same.' He said, 'Now, Bettie, I want you to take this package in your room, and put it in your own trunk; raise your underclothes up, and place them between your clothes. Lock the trunk, and bring me the key here. Bettie, I want to see if your trunk key is a good one.' He took the two keys to the trunk, and looked at them, and said, 'Yes, Bettie, they will do;' and he asked her had she strapped the trunk. She told him, 'No, she locked it;' and he said to her, 'Bettie, are you crazy?' She said, 'No,' that she thought locking the trunk was sufficient; and he told her it was not sufficient, and to go back and strap it up; that he had given her all that he had in the world, and that if she didn't take care of it she would wind up in the poor-house. Then he turned to me, and asked me again, and said, 'Now, Fannie, you have seen me give Bettie everything I possess in the world.' Then he turned to me and told me I could go, that he was through with me. And Bettie said to me, 'Fannie, go down stairs to the store-room and get a bottle of that liquid bread, and take the cork out and bring me a glassful up here for father. I got the liquid bread, carried it up stairs, and handed it to Bettie. She handed it to her father. He took a sip of it, and turned to me, and said again to me, 'Fannie, you see me give Bettie everything I possess in this world, didn't you?' I said, 'Yes, sir; I did.' And he turned to me and said, 'Fannie, remember that now.' And I said, 'Yes, sir.' And he told her to take special care of the trunk keys; and, whatever she did, not to leave the trunk open, and let any one steal those things out of there that he had given her; and if she did, she would go the poor-house; and to keep her trunk keys on her person day and night."

It is argued that Mr. Thomas did not make the gift *mortis causa* of his property to his child Bettie, as distinctly and incontrovertibly proved, because of his oft and emphatic

statement of intention to provide for her by will; and time and time again, it is argued that, in the eight or ten minutes of Mr. Gilliam's presence, with him alone, in the death chamber, only a brief time on Friday afternoon before he expired, he made an appointment with Mr. Gilliam to go to Mr. Gilliam's office the next day to have his will written. Aside from the utter improbability, not to say impossibility, of an enfeebled and dying old man, in the country, beyond the limits of the city of Richmond, making an engagement at 4 o'clock P.M. to arise from what proved to be his deathbed early that night, and to come into the city and to a lawyer's office the next day, there is no evidence in the record of any such purpose or possibility. What passed between Mr. Thomas and Mr. Gilliam, in those eight or ten minutes, we can never judicially know. Thomas is dead; and Mr. Gilliam, one of the counsel for appellant, has declined to testify in this case. The appellant, by his cross-examination, elicited from Dr. McGuire: "I think Mr. Gilliam told me, a short time afterwards, that Mr. Thomas, in his interview with him, said there were some papers that he wanted to get hold of, then out of reach, and that he had postponed the making of his will until the next day. I think he had an appointment with Mr. Gilliam for the next day. I think Mr. Gilliam said this." Both this question and answer were objected to by the plaintiffs as illegal. Mr. Gilliam's attitude, of the Sphinx, cannot be operated, as hearsay evidence in this case, by any *Œdipus*, however respectable; and, howsoever important or interesting Mr. Gilliam's pregnancy of what occurred in that brief interview with the dying man may be, he cannot be delivered by the process of obstetrics, unknown to the science of the law. If, too, the field of conjecture be open, it is the most reasonable supposition that if Mr. Thomas did, in fact, want his will written the next day, it was only for the purpose of devising to his daughter, in addition to the personal property he had given her, his valuable real estate, which he knew could not be given except by deed or will. While no witness testifies

that Thomas ever said that he intended to give his whole estate to his daughter, yet he frequently declared his purpose to provide for her liberally, and no one ever heard him say that he intended to give anything to any one else; and the plain and positive proof is that he did not intend (but emphatically asserted to the contrary), that his collateral kindred should have any part of "what he had at his death." To whom, then, but his daughter, must he have intended his property to go at his death? If he had left her his whole estate by a will, instead of the larger part, only, by *donatio mortis causa*, all just-minded persons would have said, as Dr. McGuire's last utterance to him, "You have only done justice."

Mr. Thomas was buried on Sunday. On the night of Monday, the next day, Watkins called to see Bettie, and he says that she did not then say to him that her father had given her his money, his bank-book, or other securities, or the key to his box in the bank or his safe at Drewry & Co.'s, and that she did then say, "as there was no will, she supposed that all she would have was the property held by me as trustee, and that she wished I would see Mr. Gilliam in her behalf." This statement, if true, has already been explained by what Dr. McGuire and others had so impressively told Bettie Lewis would be her condition if her father died without a will; but is it not manifestly impossible for Bettie Lewis to have affirmed positively, as a fact to her knowledge, on Monday night, that Mr. Thomas had left "no will, and she knew it," when then there had been no opening or examination of Mr. Thomas' papers or places of safe deposit? Dr. McGuire says: "Bettie Lewis certainly did not know that before the old man's death; for she and Fannie both told me that they didn't know whether the old man had made a will or not, when Mr. Gilliam was there." Bettie Lewis has been peremptorily denied the privilege of testifying in this case, notwithstanding the great concern she has at stake; and simple justice demands that the statements of this witness, Watkins, for the appellant, should be tested by all the

touchstones of truth—probability and consistency—which are the fixed standards of evidence. Out of the mouth of this witness himself the records show that he involves himself in flat and flagrant self-contradictions; but, first, his attitude and animus in the case are manifested by his interview with Bettie Lewis on Thursday night, next following. He says: “I told Bettie Lewis that I had been to see Mr. Gilliam for her, and stated the case to him the best I could; and he said it was impossible to make a case of it, and that he was sorry he could not do something for her. She said it made no difference that she had employed other counsel, viz., Judge Waddill, Judge Christian and Mr. Edgar Allen. She then said she was very much obliged to me for seeing Mr. Gilliam for her. I said to her I had nothing but her interest at stake, and that I would be glad to know exactly what Mr. Thomas said to her in his last moments. Fannie Coles, who was sitting near by, said: ‘Bettie, Judge Christian told you not to talk to any one on the subject.’ I said, ‘If such are your instructions, I certainly don’t want to hear anything about it.’” By this, Mr. Watkins’ own version, it appears that after Bettie Lewis had told him she had confided her case to the counsel of her choice, he, adroitly and artfully prefacing his question with the professing of his disinterested solicitude for her interest at stake, asked her to tell him “exactly what Mr. Thomas said to her in his last moments.” The object of this attempt is obvious enough; but by the significance of Mr. Watkins’ attitude in this case, as disclosed by the record, it is made perspicuously plain. Fannie Coles’ account of this interview, in response to the 287th cross-question, shows that Mr. Watkins used importunity and expostulation in his endeavor to induce Bettie Lewis to let him “know exactly what Mr. Thomas said to her in his last moments,” and that it was not until he had been repeatedly denied and thwarted in his attempt that he said (if, indeed, he said it at all), “If such are your instructions, I certainly don’t want to hear anything about it.” Fannie Coles says: “Mr. Watkins came out there

one night and asked Bettie about her father giving her the keys. Her reply was to him: 'Mr. Watkins, I do not care to talk on that subject at all.' Mr. Watkins turned to me and said: 'Fannie, don't you think Bettie ought to tell me all about the keys, for I am just the same to her as her father?' I said: 'Mr. Watkins, I don't know anything about that. She has her lawyers, and she ought to do as they told her to do.' And Mr. Watkins said: 'Now, Fannie, you know there is nothing in the world that I would not do for Bettie.' I said: 'You and Bettie can suit yourselves about the matter. I have no more to say.' Mr. Watkins again asked her. She said: 'Mr. Watkins, I do not care to talk on that subject to-night.' And I remember now, as you mention the subject, that Mr. Watkins said to her: 'Bettie, I only came out here to-night to find out all about those keys.' 'The record shows that this witness, who professed that he had nothing but Bettie Lewis' interest in view, and who had promised Mr. Thomas (as he says) on the 16th day of February, 1878, "I will do the very best for her as long as I live," and who undertook to see Mr. Gilliam for the purpose of stating "her case" to him, and of seeing whether he "could make a case of it," was, a day or two after, if not at the very time, he was inviting Bettie Lewis' confidence on the ground of his fatherly interest in and for her, actually conferring with Mr. Thomas' next of kin, and entertaining a proposition to be appointed one of the curators, which only failed because Mr. Pace (Page) objected to going his security, and that, although he averred his intimate knowledge of Mr. Thomas' affairs, yet he refused to tell what he knew when requested so to do by Bettie Lewis' counsel. And this witness (except a Mr. Gravely, who knows nothing), is the only witness who has been found to defeat the fully-attested claim of Bettie Lewis to her father's bounty. He fixes Monday night, next after Mr. Thomas' death, as the date he was out at Mr. Thomas' house, by the fact that he went there to see an insurance policy; and he was certain he saw the policy there that night, and he swears that he is

certain that he saw Clay Thomas there that same evening. Yet he swears that it was on Thursday night that he went to see and did see and examine the policy, and that it was on Thursday night that he first saw Clay Thomas there. This is the unenviable attitude of this the only witness to support the contest of Mr. Thomas' collateral kindred, and to defeat his dying disposition of the bulk of his personal property. The testimony and the circumstances relied on by the appellant to show that no such gift was made by Mr. Thomas as sworn to by Fannie Coles, and attested by corroborating facts, do not, we think, furnish a sufficient basis for even reasonable conjecture; much less to assure the guarded discretion of a court of justice. The circumstance that there is but one direct witness to the gift, competent to testify (the appellant declining to allow the donee as a witness when offered), does not affect the validity of the gift. One witness, if credible, is sufficient. The law does not require more than one; and especially, as in this case, when that one is not only unimpeached, but corroborated. Nor does the magnitude of the gift affect its validity. It may extend to the whole of the donor's personal estate. The law fixes no limit. In the case of *Duffield v. Elwes*,¹ the gift *causa mortis* was of the value of \$165,000. In *Hatch v. Atkinson*² the Court says: "The common law does not require the gift to be executed in the presence of any stated number of witnesses; nor does it limit the amount of the property that may thus be disposed of."

The *factum* of the gift in this case being clearly and conclusively proved, as we think it indisputably has been, it only remains to state the law and apply it to the facts proved. They show all the essential attributes or constituent elements of a *donatio mortis causa*, as defined by the law and established by the course of adjudication. The

¹ 1 Bligh., N. S., 497.

² 56 Me., 327.

³ *Ward v. Turner*. 1 White & T. Lead. Cas. Eq., pt. 2, p. 1251, note 2 Schouler, Pers. Prop., 132-136.

gift was made in *periculo mortis*, under the apprehension of death as imminent; and it was of personal property, such as, under the law, may be the subject of a gift *mortis causa*. Possession or delivery was made at the time of the gift; and the donor died of that illness in a few hours after the making of the gift. Thus the gift, inchoate conditional, and defeasible when made, became absolute at the donor's death. Delivery is essential. It may be either actual, by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by delivery of the key of the receptacle.¹

Many cases were cited by the appellant. In some of them it did not appear that there was any intention to give, while in others the delivery of possession was not complete; the donor intentionally retaining control or dominion. In the cases of *Miller v. Jeffress*² there was no delivery whatever, either actual or constructive. The delivery of the keys to Bettie Lewis, with words of gift, by her father, upon his death-bed, invested her with the same means of obtaining possession that Thomas had, and made her the owner, with title defeasible only by recovery or revocation of the donor, or by a deficiency of assets to pay creditors; and the mere existence in Stephen B. Hughes' hands of a duplicate set of keys, for precaution against loss or accident, which he had no right or authority to use, did not impair the validity of the gift which he did make to his daughter in his last

¹ *Jones v. Selby*, Prec. Ch., 300; *Ward v. Turner*, 2 Ves. Sr., 431; 1 *White & T. Lead*, Cas. Eq., 1205; *Jones v. Brown*, 34 N. H., 445; *Cooper v. Burr*, 45 Barb., 10; *Penfield v. Thayer*, 2 E. D. Smith, 305; *Westerlo v. Dewitt*, 36 N. Y., 341; *Ellis v. Secor*, 31 Mich., 185; *Hillebrant v. Brewer*, 6 Tex., 45; *Elam v. Keen*, 4 Leigh, 333; *Stephenson v. King*, 81 Ky., 425; *Lee's Executor v. Boak*, 11 Grat., 182.

² 4 Grat., 472; *Lewis v. Mason*, 84 Va., 731; 10 S. E. Rep., 529; *Yancy v. Field*, 85 Va., 756; 8 S. E. Rep., 721; *Rowe v. Marchant*, 86 Va., 177; 9 S. E. Rep., 995.

moments, in the most unqualified manner; and being thus invested with lawful ownership, the law, in case of refusal by the officers of the bank, would open the doors to her. It is contended that the gift was testamentary, because of the words in the affidavits of Bettie Lewis and Fannie Coles—"were her's in case of his death;" "to be her's in case of his death." The affidavits were prepared by counsel and certified by the notary as a predication for the appointment of receivers, and they were not intended, and could not be regarded as evidence; and they do not purport to give the language of the affiants, nor to state the language and actions, in detail, of Mr. Thomas in making the gift. But even if Mr. Thomas had used the very words, "to be hers in case of his death," it would have been but expressing in terms the very definition, substance and form of a gift *mortis causa*, as given by all the law writers and adjudged cases—that it is conditional, defeasible, not to be absolute and irrevocable unless and until the death of the donor from the impending peril, under the apprehension of which the gift was made.¹ The cases in which gifts made in similar and identical language by dying donors have been held to be valid donations *mortis causa* are numerous; the principle being that the expression, "In case of my death it is yours," or like words, do not of themselves make a testamentary disposition, but merely express the condition which the law annexes to every donation *mortis causa*.² In the case of *Sterling v. Wilkinson*,³ the gift was made more than three years before the donor died, and was not made in view of death impending; and the donor actually did retain and exercise control over the subject of

¹ Bouv. Law Dict., "*Donatio mortis causa*;" 1 Abb. Law Dict., 402; 2 Jac. Law Dict., 307; 3 Pom. Eq. Jur., § 1146; 2 Schouler Pers. Prop. (2d Ed.), c. 5, § 135; *Parish v. Stone*, 14 Pick., 198; *Grover v. Grover*, 24 Pick., 261; *Gano v. Fisk*, 43 Ohio St., 462; 3 N. E. Rep., 532; *Taylor v. Henry*, 48 Md., 550.

² *Snellgrove v. Baily*, 3 Atk., 214; English notes to *Ward v. Turner*, 1 White & T. Lead. Cas. Eq., 1222; *Ashbrook v. Ryon*, 2 Bush., 228; *Grymes v. Hone*, 49 N. Y., 17.

³ 3 S. E. Rep., 533; 83 Va., 791.

the gift by disposing of so many of the bonds as were necessary to indemnify his indorsers. In the case of *Basket v. Hassell*,¹ the decision turned alone on the construction and legal effect of the indorsement upon the certificate by the donor: "Pay to Martin Basket; . . . no one else; then not until my death." This was held to be a testamentary disposition; but in the opinion of the court, Mr. Justice MATTHEWS says; "The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*."

It is contended that the gift by Thomas, in this case, was invalid because it comprised the bulk of his estate. The *jus disponendi* is the essential value and element of property, and the exercise of that right is commended in the beatitude, "It is more blessed to give than to receive." By the law of Virginia a person may make a dying disposition of all of his personal property, *donatio mortis causa*; and there is no limit as to the extent of the gift—whether of the whole or of the part—*inter vivos* or *donatio mortis causa*. Such limitation can only be by express legislation, and the courts are invested with no such function. The Roman or civil law of *donationes mortis causa* did recognize the limitation or restriction; but the common law does not limit the amount, absolute or comparative, of the personal estate which may thus be disposed of.²

It is contended that the gift in this case comes within the operation of section 2414 of the Code of Virginia; and as the donor and donee resided together at the time of the gift, possession by the donee at the common place of residence was not sufficient, and for that reason the gift must

¹ 107 U. S., 602, 2 Sup. Ct. Rep., 415.

² *Michener v. Dale*, 23 Pa. St., 59; *Seabright v. Seabright*, 28 W. Va., 481; *Hatch v. Atkinson*, 56 Me., 327; *White & T. Lead. Cas. Eq. pt. 2*, p. 1251; 2 Schouler, Pers. Prop., 132-136.

fail. The section is: "No gift of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor or donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession, within the meaning of this section." In the construction of statutes the general rule is that the words used in the statute are to be construed according to their natural and ordinary, popular and accepted, use and meaning, unless it plainly appear that it was intended by the legislature to give to them a different, special and extraordinary meaning. All the law writers use the simple term "gift," when used without qualification, to express the "ordinary gift" or "simple gift" which transfers an absolute and irrevocable title to the donee, as contradistinguished from the extraordinary and technical gift *mortis causa*, which is made under the apprehension of impending death, and transfers only a conditional, defeasible and revocable interest. The peculiar gift *mortis causa* is always designated by its special, technical name; and it is never understood or intended to be embraced or expressed by the term "gift," merely. A gift *mortis causa* is a very different thing from a "gift" in many essential particulars.¹ The policy of the section (2414) originated in 1757, and again in 1758 and in 1787, in the Revised Code of 1819, in the Code of 1849, and in the Code of 1887; and in none of these enactments is the special, peculiar and distinctive technical descriptive phrase, "gifts *mortis causa*," to be found. The mischief intended to be guarded against in the policy of the statute was as to gifts *inter vivos*; and until 1849 it was applicable only to gifts of slaves. Then it was made to embrace all "goods and chattels;" but it would violate both reason and analogy to hold that in its new, any more than in its ancient form, it would embrace gifts *mortis causa*. It is an established rule of construction that the existing law is not intended

¹ 2 Kent, Comm. lecture 38; 2 Schouler, Pers. Prop. (2 Ed.), § 64.

to be changed unless such intention plainly appear; and the inference is irresistible that the legislature did not intend to abrogate the common law of *donatio mortis causa*, without having expressly and by proper, descriptive, legal language said so.¹ The disposition of personal property by *donatio mortis causa* has been a principle and practice of the common law, both in England and in the States of this Union, for centuries past; and although, since the day of Lord HARWICKE, there have been extrajudicial utterances in deprecation of it, it is to-day a fixed principle of enlightened jurisprudence in all civilized countries. It is the imperative function of the courts to interpret and operate the law as it is, not as they may think it ought to be.

In the able and elaborate opinion of Judge LEAKE, filed with the record in this case, he decided (saying, "but certainly not without doubts," "the question to my mind is a very doubtful one") that the gift by Mr. Thomas of his bank book, showing the amount of his deposits in the Planters' National Bank, was ineffectual in law as a *donatio mortis causa* of the money to his credit in the said bank; and he decreed accordingly. In this I am of the opinion the decree under review is erroneous, and that it should be, under the rule, in this particular, corrected in favor of the appellees, and in all other respects affirmed. The majority of the Court think the decree is erroneous, and that it must be affirmed as it is. Every gift of personal property—in its largest sense—capable of being given, or constructive, may be the subject of a *donatio mortis causa*, including money, bank notes, bills, certificates of deposit, and evidence of debt.² In the case said: "This term 'delivery'

¹ *Parramore v. Taylor*, 11 Gr. Cas., 205; *Durham v. Dunkley*, 6 Gr. Cas., 114.

² *Lee's Ex'r v. Bosk*, 11 Gr. Cas., 114.

Kearl v. Leigh, 333; 1 White.

Steen v. High (N. S.), 497; 6 Gr. Cas., 114.

Mass., 35.

narrow sense as to import that the chattel or property is to go literally into the hands of the recipient and to be carried away. There are many articles which might be made the subjects of a *donation mortis causa* in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a writ with its contents might be effectually given and delivered in such a case by a delivery of the key. In the case of *Crover v. Burr*,¹ it is said: "The situation, relation and circumstances of the parties and of the subject of the gift, may be taken into consideration in determining the intent to give, and the fact of delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary." In *Ellis v. Leese*,² Judge CARR said: "There are many things of which actual manual tradition cannot be made, either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what, under the circumstances will, in reason, be considered equivalent to an actual delivery." In *Hatch v. Atkinson*,³ the Court said that delivery must be as complete "as the nature of the property would admit of." In *Stephenson's Appeal*,⁴ the Court, referring to the case of *Ashford v. Thornton*, as to a book, says: "What evidence is there that the book was deposited in that case does not appear. It is a deposit book and it must be so, it was so admitted by the bank that it had to be so in the bank that much more when acknowledged, we cannot see why it should be the right of Mr. Thomas, in stead of a certificate, to have a book made and carried by the bank to a separate account." It is

to be changed unless such intention plainly appear; and the inference is irresistible that the legislature did not intend to abrogate the common law of *donatio mortis causa*, without having expressly and by proper, descriptive, legal language said so.¹ The disposition of personal property by *donatio mortis causa* has been a principle and practice of the common law, both in England and in the States of this Union, for centuries past; and although, since the day of Lord HARWICKE, there have been extrajudicial utterances in deprecation of it, it is to-day a fixed principle of enlightened jurisprudence in all civilized countries. It is the imperative function of the courts to interpret and operate the law as it is, not as they may think it ought to be.

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¹ *Parramore v. Taylor*, 11 Grat., 242, 243; *Owners v. Bragdon*, 21 Grat., 695; *Durham v. Dunkly*, 6 Rand. Va., 139.

² *Lee's Ex'r v. Boak*, 11 Grat., 182, and cases there cited; *Elam v. Keen*, 4 Leigh, 333; 1 *White & T. Lead. Cas. Eq.*, 1205; *Duffield v. Elwes*, 1 Bligh (N. S.), 497; *Grover v. Grover*, 24 Pick., 265.

³ 114 Mass., 33.

narrow sense as to import that the chattel or property is to go literally into the hands of the recipient, and to be carried away. There are many articles which might be made the subjects of a donation *mortis causa*, in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a trunk, with its contents, might be effectually given and delivered in such a case by a delivery of the key. . . .” In the case of *Cooper v. Burr*,¹ it is said: “The situation, relation and circumstances of the parties, and of the subject of the gift, may be taken into consideration in determining the intent to give, and the fact as to delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary.” In *Elam v. Keen*,² Judge CARR said: “There are many things of which actual, manual tradition cannot be made, either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what, under the circumstances will, in reason, be considered equivalent to an actual delivery.” In *Hatch v. Atkinson*,³ the Court said that delivery must be as complete “as the nature of the property would admit of.”⁴ In *Stephenson’s Adm’r v. King*,⁵ the Court, referring to the case of *Ashbrook v. Ryon*, as to the bank book, says: “What evidence the pass book contains of the deposit in that case does not appear. It an ordinary pass book (and it must be so inferred), it was an acknowledgment by the bank that the donor had to his credit in the bank that much money; and when actually delivered, we cannot see why it did not pass the right.” Suppose Mr. Thomas, instead of having certificates of deposits made and entered by the bank in his bank book, had taken a separate receipt or certificate of deposit for each deposit at the time it was

¹ 45 Barb., 9.

² 4 Leigh., 335.

³ 56 Me., 324.

⁴ See *Wing v. Merchant*, 57 Me., 383; *Dole v. Lincoln*; 31 Me., 422; *Hillebrant v. Brewer*, 6 Tex., 45; *Noble v. Smith*, 2 Johns., 52; *Jones v. Brown*, 34 N. H., 445; *Marsh v. Fuller*, 18 N. H., 360.

⁵ 81 Ky., 425.

made. Would not the delivery, with words of gift of each one, of such receipts or certificates of deposit have been as effectual in law to pass the title to his money in bank as the delivery of the letter in Stephenson's Adm'r *v.* King, or the attorney's receipt for claims in his hands for collection in *Elam v. Keen*? Mr. Thomas' bank book had just been written up or balanced by the bank, and it showed on its face the balance due to him by the bank. It was the bank's acknowledgment of indebtedness to Thomas, and the only voucher or evidence which he had, upon which the law implies a promise to pay; and it was transferable by delivery without writing, like any other chose in action. It passed the equitable title, and that is sufficient. The "beneficial owner" of any chose in action may sue upon it in his own name.¹ There is a difference between a savings bank pass book and an ordinary bank book, in that by a special method and agreement, on the mere presentation of the savings bank pass book, the bank will pay, but this is the mere special mode of dealing agreed on by the parties in that case; and, though the bank would have the right to require evidence to satisfy it that Mr. Thomas had duly delivered, with words of gift sufficient in law to transfer his title to his money in the bank to his donee, Bettie Lewis, his daughter, yet that would not, any more than in the case of the keys, affect her title and right to demand the money, which the law would enforce.

This case was first argued before Chancellor FRZ-HUGH, and submitted for his decision; but he died in a few days, leaving nothing to show what conclusion he would have reached upon the facts. He had (as it appears by what is stated in the petition for appeal), noted down a few platitudes or propositions of law, which (no more than if he had copied the Decalogue), do not afford the slightest clue as to what he would have decreed upon the facts, under the law. We have given to this case elaborate consideration and the closest scrutiny, and, upon the law and the facts, our judgment is to affirm the decree of the chancery court of the city of Richmond.

¹ Section 2860, Code Va., 1887.

GIFTS MORTIS CAUSA.

To the unique position occupied by gifts mortis causa in English law is traceable much of that strange contrariety in the decided cases which a glance at the reports reveals. Their omission from the Statute of Frauds, 29 Car. II, c. 3, was due to the general ignorance of their nature, since the toleration of noncupative wills prior to that enactment postponed the occasion for their appearance before the courts, though Bracton and Glanville had made them familiar as early as Henry II (Schouler, Wills, § 190; Ward v. Turner, 2 Ves. Sen., 436; Tate v. Hilbert, 2 Ves. Jr., 119).

To engraft an exception on the wills clause of the statute, the Roman Law was called upon to furnish the principle upon which to support these death gifts. Adopted at first subject to very narrow limitations, they have assumed such proportions, until now, as strikingly illustrated in the principal case, a man may give away his entire estate to a bedside attendant by the simple act of delivery, proved by one witness, and rather slender corroborating circumstances (Headley v. Kirby, 18 Pa., 326; Hedges v. Hedges, Bill in Ch., 269; Jones v. Selby, *Ibid.* 300; Ward v. Turner, 2 Ves. Sr., 436; 2 Kent's Com., 445; (Schouler's Pers. Prop., Vol. 2, p. 145).

Of the three notions of a donatio mortis causa at the Roman Law, the one adopted by the law of England, is that which is given in the Digest as the second: where the property in the chattel passed at the time the gift was made, and which was defensible in the event of an escape from the danger or the illness which prompted it. Delivery was absolutely essential in

this if not in the other Roman forms, for they, partaking of the nature of legacies, were deliverable only after the death of the donor (Swinburne on Wills, cited by Lord LOUGHBOROUGH in Tate v. Hilbert, 2 Ves. Jr., 119; Ward v. Turner, 2 Ves. Sr., 431; White & Ind. L. C. Eq., 1089; Sohm's Roman Law, 138-139).

The modern idea of a gift *mortis causa* shows these gifts to be a hybrid growth of the parentage of both a legacy and a gift *inter vivos*. They resemble legacies, in that they are ambulatory and revocable; and they differ from legacies and are like gifts, *inter vivos*, in the fact that control of the chattel is completely vested in the donee, during the donor's lifetime (2 Bl. Com., 514; 2 Kent Com., 445; Jones v. Selby, Pric. Ch., 300; Hedges v. Hedges, *Ibid.*, 269; Daury v. Smith, 1 P. Wms., 404; Lawson v. Lawson, P. Wms., 440).

The gift of all a man's estate.—In the principal case it was strongly urged that the donor's act, as evidenced by the gift of all his personal estate amounting to \$225,000, was testamentary in character, and hence void as a noncupative will. And this argument has received the sanction of considerable authority.

In Headley v. Kirby, 18 Pa., 326, the donor said, "Ann, I am dying; all that I have is here and all is yours; do everything for me; here are my keys, take them." The property which was thus attempted to be given consisted of a watch and chain, pencil case, teaspoons, trunks, a promissory note for \$1,600, a book of deposit in a saving fund, etc. The Supreme Court refused to uphold the gift. LOWREY, J.: "The gift in the case be-

fore us professed to dispose of all the donor's property, and to be made in prospect of death, and is therefore a will if it receive the sanction of the law. . . . And it may be safely declared that no mere gift made in prospect of death and professing to pass all one's property to another, to take effect after death, can be valid under our statute of wills, *no matter what delivery may have accompanied it.*"

While the conclusion reached by the Court was obviously correct, the gift failing for want of delivery, the dictum is subject to criticism.

The fallacy of the learned judge's argument resta in that a valid gift *mortis causa* of all a man's estate can never be a will, because the essential element of a will is lacking—namely, that the testator have entire control, or the right to control, the interest he attempts to bequeath until death; while it is fatal to the donee's case if the donor *mortis causa* has not parted with the immediate control of the property (*Ward v. Turner*, 2 Ves. Sr., 431; *Duffield v. Elwes*, 1 Bligh, N. S., 497; *Drury v. Smith*, 1 P. Wms., 404; *Miller v. Miller*, 3 Atk., 356; *Hill v. Chapman*, 3 Bro. C. C., 612; *Schouler's Pers. Prop.*, § 162.

This question came before the Supreme Court again in *Michener v. Dale*, 23 Pa. St., 64, wherein we have the following explanation of *Headley v. Kirby*, from Mr. Justice WOODWARD: "It was greatly insisted on in argument that the Court ought to have instructed the jury that if the gold was the *principal* part of Mr. Dale's property, he could not make a *donatio mortis causa* of it, and for this *Headley v. Kirby* was relied on. In that case there was a variety of chattels—they were not specified by the

donor—nothing more than a constructive delivery occurred—the language was evidently testamentary—and it referred expressly to all her property." And a gift was accordingly upheld of a bag of gold, though it constituted the donor's entire estate.

In a note to *Meach v. Meach*, 24 Vt., Judge REDFIELD pointed out the absurdity of the proposition, by attempting to draw the line, as to what shall be the money limit or the ratio of the gift to the entire estate, in any case, which shall define where a valid gift ends, and a testamentary disposition begins. If one may remit a debt of £500, by the simple act of delivering the receipt for it to a third person, with a general expression of desire in the briefest words that the debt shall be cancelled (*Moore v. Darton*, 7 Eng. L. and Eq. R., 134), it can scarcely be said that twice that amount is, therefore, not a good *donatio mortis causa*, simply because it is twice that amount.

It is believed, therefore, and upon sufficient grounds that the accident of a man's entire estate, or the greater part thereof, consisting of personal property, ought not, and generally will not, militate against the donee's right, the other elements of a valid gift *mortis causa* being present.

The fact, however, that a man has disposed of his entire estate by gift, raises a strong presumption that he intended a gift *mortis causa* rather than an irrevocable donation *inter vivos*. So where there is a contest as to whether a gift has been made, its magnitude may be the foundation of an inference, where an issue has been framed to a common law court, to try by jury the fact of the gift, that no

gift was made, and that the alleged donor really made a noncupative will (Seabright v. Seabright, 28 W. Va., 415; Hatch v. Alinson, 56 Me., 326. See an article, Vol. I, p. 1, AMERICAN LAW REGISTER, treating of Headley v. Kirby; Furgharson v. Cave, 2 Coll. Ch. 356.)

The bulk of authority favors the support of the gift even of the entire estate, where there has been specific delivery of the subject matter (Marshall v. Berry, 13 Allen, 43; Schouler, sec. 146).

It is of the essence of a valid gift that the donor part with the immediate control of the subject matter; if the donee's control is delayed until after the death of the donor, the act is testamentary.

In *Basket v. Hassell*, 107 U. S., 602, the donor endorsed on the back of a certificate of deposit, "Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death," etc., it was held that it was a testamentary disposition of the fund represented by the certificate (*Mitchell v. Smith*, 4 De J. and S., 422; *Daniel v. Smith* (Cal.), 17 Pac. Rep., 683; *Walter v. Ford*, 74 Mo., 195; *Reddell v. Dobree*, 10 Sim., 249; *Earle v. Bostford*, 23 New Bruns., 407).

The test as to whether the donor's act, in any particular case, is testamentary, rather than a donation is: If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, but only confers upon the donee the power to control the property, after the death of the donor then the character of the act is testamentary, and within the provisions of the wills act.

In *Edwards v. Jones*, 1 My. and

Cr., 226, Lord COTTENHAM declared "that a *donatio mortis causa* leaves the whole title in the donor, unless the event occurs which is to divest him." The statement is misleading, since the donor's title must be completely divested by the act of delivery, subject to revest in him *ipso facto* upon his recovery from the threatened peril (*Seabright v. Seabright*, 28 W. Va.).

11. *Must be made in apprehension of death.*

"*Donatio mortis causa*," it is said in the Digest, "*magis causa donandi, magis est quam mortis causa donatio*"—death is rather the cause of the gift than the mere occasion of its being made (Dig. Lib. 2, tit. 7; Sohm's Roman Law, p. 139; *Meach v. Meach*, 24 Vt.). And GIBSON, C. J., said it was immaterial whether the anticipation of death be induced by sickness or by any other cause; as where the donor was infirm with age or about to undertake a hazardous journey, or a soldier preparing for battle (*Nicholas v. Adams*, 2 Wh. 17; but see *Roberts v. Draper*, 18 Bradw., 167; *Earle v. Bostford*, 23 New Bruns., 407).

This position has been followed in *Gass v. Simpson*, 4 Cold. (Tenn.), 288, where the donor was in danger of assassination, incident to escape from the Confederate conscription; and in *Virgin v. Gaither*, 42 Ill., 39, where a gift made by a soldier going to the front was sufficient (*Nicholson v. Adams*, 2 Wh., 17; but see *Roberts v. Draper*, 18 Bradw., 167; *Earle v. Bostford*, 23 New Bruns., 407).

Subject to the instances mentioned, it is very well settled in nearly every other jurisdiction that the gift must be made with reference to some particular cause of

death, which either exists at the time or the donor imagines to exist, and which may result in his death (*Miller v. Miller*, 1 P. Wms., 356; *Robson v. Robson*, 3 Del. Ch., 51; *Knott v. Hogan* 4 Metc. (Ky.), 101; *Smith v. Ferguson*, 20 Ind., 350; *Michener v. Dale*, 22 Pa., 59; *Parker v. Savings Bank*, 78 Me., 470; *Gomley v. Litsenberger*, 51 Pa., 345; *Smith v. Dorsey*, 30 Ind., 451; *Craig v. Kittridge*, 46 N. H., 57; *Duffield v. Elwes*, 1 Bligh N. S., 497). The peril must be immediate, and it seems that a very strong case is required to support a gift made by one in infirm old age with no other apprehension than that which comes from such a condition: *Schouler*, p. 146. In *Grymes v. Hone*, 49 N. Y., 117, a gift made by a man eighty years old, in failing health, which continued to his death, was upheld (*Dorland v. Taylor*, 52 Iowa, 503).

If the donor recover from the illness which threatens him at the time the gift is made, and subsequently die, the donation is revoked *ipso facto* by the recovery: *Keston v. Hight*, 17 Me., 287; *Stariland v. Willot*, 3 Mac. and Gov., 664. But any change in the donor's mind as to his chances of recovery will not affect the donation, for a disposition by *donatio mortis causa* is not to be disturbed by the alternation of hope and despair, dependent upon the doubtful spinning of the die, but only by the turn up of life: *GILSON, J., Nicholson v. Adams, supra.*"

There is reason in the principle which would confine within the limits of an *immediate peril of death*, whether from sickness or any external danger, the condition essential to support a valid gift. If a man in perfect health, fearing the outcome

of a dangerous journey, hands over his property to his son, requesting that it be delivered back to him on his return, the Courts will refuse to uphold the gift in the event of his death, because the Legislature has provided, out of reasons of public policy, a formal mode of accomplishing the same end without the corresponding danger of frauds. (*Roberts v. Draper*, 18 Bradw., 167; *Prince v. Hazelton*, 20 John's (N. Y.), 513; 2 Finch's Prec. in Ch. 269; *Shirley v. Whitehead*, 1 Ired. Eq. (N. C.), 130; *Robson v. Robson, supra.*) In *Irish v. Nutting*, 47 Barb. (N. Y.), 385, the learned Court confined the danger to a death by sickness: *Dexter v. Gautier*, 5 Robt., 216.

III. *Evidence of the gift. Delivery of the means of "getting at" the chattel sufficient.*

LORD HARDWICKE, in 1749, upheld a gift of a bond, induced by mere delivery upon the very technical ground that "Tho' you may give evidence of a deed at law that is lost, you cannot of a bond, for you must make proof of it." He who has the bond may do what he pleases with it and thus disable the donor from bringing an action. Moreover, bonds in English law were regarded as *bona notabilia*, and administration had to be taken out in the parish where the bond was found: *Snellgrove v. Bailly*, 3 Atk., 214.

In LORD ELDON's time proof was no longer necessary, but that chancellor decided that the delivery of the bond transferred the debt represented by the bond, being sufficient evidence of the parting of dominion by the donor: *Duffield v. Elwes*, 1 Bligh, N. S.¹

"The question in any case is this, whether the act of the donor being,

as far as the act of the donor itself is to be viewed complete, the persons who represent that donor . . . are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel . . . which is the subject of the donation *mortis causa*, whether after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee. . . . I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor. See also Story's Eq., Section 607 c."

This is the great test in any case as to whether the donee has sufficient title to enforce his gift (see *Gardner v. Gardner*, 3 Mad. Ch., 185; *Wells v. Tucker*, 3 Binney, 370; *Blount v. Edwards*, 4 Bro. Ch., 72; *Parrish v. Stone*, 14 Pick. (Mass.), 205; *Waring's Adm. v. Edwards*, 11 Md., 424).

Having reached the conclusion that the delivery of a bond would uphold a gift of the debt, what attitude should be assumed towards a gift, by delivery, of a mortgage deed? Lord HARDWICKE refused to decide this question in *Hassel v. Tynte*, Amb., 319; but in 2 *Atkins*, 319, he is reported as saying that if a mortgagee gave to his mortgagor the deeds of the mortgage and that fact was proved, it was a gift of the money for which the deeds were security.

But there was a difficulty to obviate—the Statute of Frauds. Lord

ELDON, explaining Lord HARDWICKE, disposed of it after this fashion: If a mortgagee gave a mortgagor the deeds, the Statute would not stand in the way; for the deeds being in the hands of the mortgagor, though the estate in the land was still in the mortgagee, yet by operation of law, a trust would be created in the mortgagee, to make a good gift of the debt to the mortgagor to whom he had delivered the deeds.

The double phase of the legal aspect of a mortgage—an estate in fee upon condition, and a security for the debt is relied on to sustain the principle, that having shown "that the debt is well given or well forgiven, as a result of the interest given, the person who has the land becomes in equity trustee for the person entitled to the money."

Agreeably to the above reasoning, a gift of mortgages and judgments on a mortgage, aggregating in value £30,000, was sustained in the House of Lords; *Duffield v. Elwes*, 1 Bligh N. S., 514; *Chase v. Redding*, 13 Gray, 418; *Duncombe v. Richards*, 46 Mich., 166; *Hurst v. Beach*, 5 Madd., 351.

Duffield v. Elwes created almost a revolution in this branch of the law, opening the door to every form of negotiable instrument, shares of stock and the like (*Schouler Pers. Prop.*, Sec. 135). In fine, delivery of the means of "getting at" a fund or a chattel, would be sufficient to support a gift *mortis causa* of that fund or that chattel.

a. *Delivery of a key.*

It is upon the principle enunciated by Lord ELDON that the delivery of a key of a receptacle, under certain conditions, will suffice to uphold a gift of the contents of that receptacle. The positive con-

dition annexed to such a ruling, however, is that the box or trunk be beyond the control or custody of the donor. In *Powell v. Hellicar*, 26 Beav., 261, a dressing case, the keys of which were delivered, remained in the custody of the donor. The Court held the gift incomplete; and the same doctrine has received sanction in this country: *Reddell v. Dobree*, 10 Sim., 244; *Hatch v. Atkinson*, 56 Me., 324; *Headley v. Kirby*, 18 Pa., 326; *Cooper v. Burr*, 45 Barb., 9; *Coleman v. Parker*, 114 Mass., 30.

"While delivery of the key of a warehouse or other place of deposit, where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk, chest or box in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles": *WALTON, J., Hatch v. Atkinson*, 56 Me., 326.

The rule stated is slightly incorrect. The fact that the donor could have handed over the contents is no test. The question is in every case, has the donor parted with his custody of the receptacle and is it beyond his control? (see *Schouler's Pers. Prop.*, § 163).

b. Delivery of Negotiable instruments.

That there can be a valid gift *mortis causa* by a mere delivery of the check, promissory note or bill of exchange of a third party in the hands of the donor, is beyond question at this time: *Parish v. Stone*, 14 Pick., 198; *Harris v. Clarke*, 3 Coms., 93; *Bank v. Williams*, 13 Mich., 282; *Hewitt v.*

Kaye, L. R., 6 Eq., 198; *Clement v. Cheeseman*, 24 Ch. Di., 631; *Veal v. Veal*, 27 Beav., 303. And this is true even without the donor's endorsement, for the donee can reduce the property he has acquired, into possession, in the name of the executor or administrator, agreeably to a well settled rule of the common law that the real owner of a chose in action can always enforce it against the nominal legal owner: *Lennox v. Roberts*, 12 Wh.; *Veal v. Veal*, 27 Beav., 303; *Duffield v. Elwes*, 1 Bligh N. S., 497; *Bates v. Kempton*, 7 Gray, 382. But where the donor has delivered to the donee his own promissory note, the donee cannot enforce it against the estate of the donor, because being merely a promise to pay, is a gift unexecuted, and the plea of want of consideration defeats the action at the threshold: *Parrish v. Stone*, *supra*; *Raymond v. Selick*, 10 Conn., 480; *Tate v. Hilbert*, 2 Ves., 111; *Harris v. Clark*, 3 Coms., 93.

There is still another reason why delivery of the donor's promissory note, without more is insufficient to constitute a valid donation: A gift *mortis causa* is always revocable until death, and there may have come a *locus poenitentiae* during the donor's life, the evidence of which is buried with him. (See 6 Harv. L. Rev., p. 37).

And the donor's bill of exchange or his check stands in the same plight as his note: (*Veal v. Veal*, *supra*.) But if the donee should endorse the check or bill or note to a third person the endorsee could enforce the obligation against the personal representatives of the donor; or if the donee should reduce the chose in action into possession, as by discounting the check at bank

or procure the acceptance of the bill the effect would be a valid donation *mortis causa*; though subject to the limitation it seems that if the acceptor should refuse to meet the bill, the conditional liability of drawer could not be imposed upon the donor's representatives.

The principle underlying all these cases is, that the delivery of a third party's paper is a gift of an actual subsisting part of the donor's property, just as much so as the delivery of a specific piece of money, and places the asset so given beyond the pale of administration. An instrument which has no other merit than the name of the donor, simply contemplates a charge against the latter's estate as a recent writer points out: "It is perfectly possible that one may be willing to give a stated amount of money or property to another, but would never wish to authorize in any way *post mortem* litigation against his estate; and checks, bills and notes given by way of *donatio mortis causa* are given probably always by laymen in ignorance of their real effect": 6 Harvard Law Review, 39.

Speaking of this subject, Malins V. C. said: "The law seems to be in a very curious state. The result of the authorities appears to be that a gift of a bill of exchange, which is by its nature payable at a future day, may be a good *donatio mortis causa*; but the gift of a check is not valid, unless it is presented for payment or paid before the death of the donor. Now, I can really see no reason why, if a bill drawn on a goldsmith, would be a good *donatio mortis causa*, a check should not be so too."

In the case before him, a donor handed two checks to his wife, pay-

able to her order, which she had discounted in a foreign bank. They were presented to the drawees for payment after his death, and payment was refused. The widow then refunded what she had received on them, and sought re-imbursement from the executors. She virtually became endorsee of the checks, and the parties were practically in the same plight as before the negotiation of them; that is, she was the holder of a paper, given by the donor, and hence could not enforce the claim against her husband's estate, if legal authority was complied with. But the Court upheld her claim. The only principle upon which such a conclusion could have been reached, was that the widow was a holder for value and without notice, an absurdity which could hardly have been tolerated (6 Har. v. S. R., 39).

The basis of the decision, so far as precedent is concerned, was *Lauson v. Lauson*, 1 P. Wms., 441, decided in 1718. A dying man gave his wife a purse and bill of exchange on his goldsmith, with which to buy mourning for the funeral. Sir Joseph Jekyll, M.R., held it to be a good *donatio mortis causa* as to the purse; and as to the bill of exchange, he first held that the testator's ordering the goldsmith to pay £100 to his wife, was but an authority and determined by the testator's death; but, subsequently, became of opinion that, having been given "to the wife for mourning, it was like directions for a funeral, and should be given effect, if possible, since it operated as an appointment."

In *Tate v. Hilbert*, 2 Ves., Jr. 111-121, Lord LOUGHBOROUGH said the decision was perfectly correct; . . . "taking the whole bill to

gether, it is an appointment of the money in the banker's hands, to the extent of £100, for the particular purpose expressed in a written appointment;" the testator having endorsed on the bill that it was for his wife's mourning. "But upon that decision I cannot say, that, in all events, drawing a cash note upon a banker is an appointment of the money in his hands."

That *Lauson v. Lauson* was incorrectly decided, and has been tacitly overruled, there can be no question. In *Beak v. Beak*, 13 Eq., 491, Bacon, V. C., said: "The estate of an intestate has to be administered by his representatives, and the authorities are clear and distinct that where a man draws a check and gives it to somebody, if that check is not presented until after the donor's death, for the amount of the check, his estate is not liable." To the same effect was *Hewitt v. Kaye*, L. R., 6 Eq., 198; *In re Mead*, L. R., 15 Ch. D., 651.

In *Broome v. Broome*, L. R., 6 Eq., 27, the donee made two unsuccessful attempts to cash the donor's check during the latter's life-time, but it was held that the gift could be upheld, because complete. I conceive that no further act was necessary to make the gift complete," per Stuart, V. C. In other words, a faultless attempt to reduce the fund represented by the check into possession, may, under circumstances, be equivalent to possession.

It seems that the gift of a donor's check upon a banker might be enforced against his estate, by the donee, if a legal analogy be accepted. A check drawn either for the part or whole of a fund in bank is not regarded as an assignment of

that fund for the protection of the banker. "A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in the original contract (*Mandeville v. Welch*, 5 Wh., 288). That is, a check is in effect an assignment of the fund represented by it, but the legal incidents of an assignment do not attach to it, in order to protect the banker from the vexation of a multiplicity of suits at the hands of a number of assignees, or the depositor himself.

With the death of the donor the authority of the bank to pay the fund ceases, and the property vests in the personal representatives of the donor immediately (*Byles on Bills*, p. 378; *Bout v. Ellis*, 11 Beav., 121). The claim of a donee, therefore, is directed against the executor, and the reason for denying that the check is an assignment and attaching the incidents, ceases, since there can be no danger of a multiplicity of suits against the bank (*Bank of Republic v. Millard*, 10 Wall, 512). The executor or administrator, holds the fund derived from the bank in trust for the assignee, the holder of the check.

The proposition suggested is neither absurd nor without legal analogies. Lord HARDWICKE, a century and a half ago, said if a man delivered over the grand bill of sale of a ship, the other elements of a valid gift being present, it would be upheld, though the donee had only an equitable title—a proposition never doubted. And in our time the thought is quite familiar that the delivery of the certificate of stock will support

a gift of the shares, provided no equities of the corporation intervene (see Cook on Stocks, § 308). It seems to the writer that the analogy in the last instance is perfect—you can have a valid gift if you do not trample upon the rights of a third person, namely, the corporation. In the check case a complete gift exists provided the shield furnished for the protection of the banker is not pierced.

c. Delivery of Pass Books as distinguished from Saving Bank Books.

In the principal case the Court refused to uphold a gift of the pass-book showing a balance in the donor's favor of \$18,000, because being a formal statement of an account, it had not the merit of representing a chose in action, and bore about the same legal relation for the purpose of the law of gifts *mortis causa* as a book of original entry (see Walsh's Ap., 122 Pa., 177). But a distinction has been taken between a savings bank book and a pass-book on a banker.

"A saving's bank book has a peculiar character," observed ENDICOTT, J., in *Pierce v. Boston Savings Bank*, 129 Mass., 432. "It is not a mere pass-book or the statement of an account, it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has as evidence of his debt. The bank is not obliged to pay the depositor the money in its hands, except upon presentation of the book; and if in good faith and without notice it pays the money deposited to the person who presents the book, although the book has been obtained fraudulently by him, the bank is not liable to the real depositor."

The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank: *Grover v. Grover*, *ex Pick.*, 261; *Sheedy v. Roach*, 124 Mass., 472; *Reddall v. Thrall* (N. Y.), 26 N. E. Rep., 627. And the delivery is not rendered ineffectual by a law of the bank, requiring an order or power of attorney from the depositor to enable a third person to draw the depositor's money: *Reddall v. Thrall*, *supra*; *Sweeny v. Bank*, 116 Mass., 384; *Wall v. Bank*, 3 Allen, 96; *Levy v. Bank*, 117 Mass., 448; *Goldrick v. Bank*, 123 Mass., 320.

But regard must be had to the laws of the saving fund institution. In *Murray v. Gannon*, 41 Md., 466, an *inter vivos* case, the delivery of the savings bank book was held not to constitute a good gift, because the only mode in which the money could be changed from one person's account to another in the bank was "by a payment of the one account and a new deposit in another account."

In England, in *McGonnell v. Murray*, Irish Rep., 3 Eq., 460, a gift of this nature was held invalid because the book does not embody the terms of the contract; but notwithstanding this decision and a formidable dictum in *In re Beak*, 13 Eq., 489, the question may be regarded as an open one.

In the United States, save in Maryland and Pennsylvania, the rule seems well settled that the delivery of a savings bank book will be sufficient to establish a gift *mortis causa*: *Corr v. McGregor*, 43 Hun., 531; *Fiero's Est.*, 2 Hun., 600; *Camp's Ap.*, 36 Conn., 88; *Brown v. Brown*, 18 Conn., 410; *Bank v. Taft*, 14 R. I., 502; *Tillinghast v. Wheaton*, 8 R. I., 536; *Cur-*

tis v. Bank, 77 Me., 151; Lord v. Bourne, 63 Me., 368; Hill v. Stevenson, 18 Am. Rep., 231; Morse on Banks, § 608.

In Walsh's Ap., 122 Pa., 177, the question arose for the first time in Pennsylvania as to whether the delivery of a savings bank book to a friend for the donor's sister, would be upheld as a valid gift *mortis causa*. The Orphans' Court decided in favor of the donee, though the rules of the savings fund corporation required transfer to be made on their books, in order to pass the legal title. "Compliance with rules of this character," said PENROSE, J., "is necessary only for the purpose of establishing the relation between the corporation and the assignee, and want of compliance does not affect the validity of the transaction as between the original parties, or persons claiming as volunteers under them." Tidewater Co. v. Kitcheman, 12 Ont., 630; U. S. v. Vaughn, 3 Binney, 394.

The Supreme Court reversed this ruling, upon the ground that possession of the book was no evidence of the ownership of the fund, and likened the legal status of a savings bank book to a book of original entry. The distinction between the note of a third person and the savings bank book is said to lie in that the note represents a promise and the book a mere assertion, from which no promise could be implied—a distinction rather difficult to apprehend.

While it is true there is no promise on the part of the bank to pay, possession of the book rightfully acquired, is some evidence of ownership since it puts tremendous obstacles in the path of the donor or his representatives, from again

asserting their right to the fund. It is of the essence of the relation subsisting between a depositor and the saving bank, that the evidence of the relation shall be by the book; and when presented by the depositor serves to identify him, and is the authority upon the faith of which payment is made. Had the donee paid value for the fund represented by the book, the bank could not annex, as a condition precedent to payment, that he procure a power of attorney from the donor or his representatives, having shown he was the real owner of the fund. (Reddall v. Thrall, 26 N. E., Rep. 627).

When the donee presents the book, then is it not *prima facie* evidence of ownership, which becomes complete upon proof that it was delivered to him with the intention to make him owner?

The delivery of a certificate of deposit, even though payable to order, it is intimated by the Court, would be upheld, when transferred without endorsement; because the donee could sue, in the name of the executor or administrator, without their assent, and where the endorsement was necessary, go into equity and compel the endorsement.

Conner v. Root, 17 Pac. Rep., 773; Basket v. Hassell, 107 U. S., 602; Gourley v. Linsen Vigler, 51 Pa., 349; Amis v. DeWitt, 33 Beav., 619; Westerloo v. Witt, 36 N. Y., 340; Stephen's Adm. v. King, 81 Ky., 425, overruling Ashbrook v. Ryan, 2 Bush., 228; Moore v. Moore, 18 Eq., 474; Brook v. Brook, 12 S. C., 460.

Now, a certificate of deposit is precisely similar in its legal constitution to the bank book of a savings fund. Presentation of the book or the certificate entitles the holder

to the fund represented by either, and it is upon this reasoning, that in every other jurisdiction, a delivery of them is regarded as vesting the donee with an equitable title which a chancellor would recognize.

In Walsh's Appeal, the Court seems to have thought that the character of the delivery required was the same as that necessary to support voluntary assignment to one person in trust for another (*Milroy v. Lord*, 4 DeG. F. and J.,

264). There is nothing in common between the subjects mentioned — one is conditional and the other absolute. In *donatio mortis causa* there is no intention in the first instance to pass the property absolutely; because if the donor recover, the property is to remain in him, and a complete title might, therefore, be inconsistent with this conditional quality.

JOHN A. MCCARTHY.

PHILADELPHIA.

EDITORIAL NOTES.

By W. D. L.

TREASON AGAINST THE STATE OF PENNSYLVANIA.

THE threatened indictment of the leaders of the Home-stead Riot for treason against the State of Pennsylvania brings the whole question of what treason is before the public. Treason against the State, as defined by its laws, consists in levying "war against the same," or "adhering to the enemies thereof giving them aid and comfort."¹ This is practically identical with treason against the United States, which is said in Article III., Section 3, of the Constitution to "consist only in levying war against them, or in adhering to their enemies giving them aid and comfort." We are not concerned with that treason which consists in giving aid and comfort to enemies of the government. Enemies in the sense in which the words are here used denotes exclusively the subjects of a foreign power at war with the

¹ P. D. 400, § 1.

government.¹ If, therefore, the strikers are guilty of treason, it is because they levied war against the Commonwealth of Pennsylvania. What is it that the rioters actually did? Before the trial it is perhaps a mistake to speak of the facts, and yet we can assume, if only for the sake of argument, that they held possession, by force, of the private property of the company. For a time at least they kept private property against the will of the lawful owner and in contravention of the principle of the laws of the State that every man has a right to the possession of his own property.

Now robbery in its legal signification may be defined as the taking of the property of another, by force and against his will. In its strict legal sense it is confined to personal property; while the crime of keeping another out of his real estate by force is called forcible detainer, and in the State of Pennsylvania renders one liable to a year's imprisonment and a fine of \$500². Still, in its broader and popular acceptation these strikers robbed the Carnegie company of the use of their works. In the same way, in the time of war, if an armed force enters the country it also takes private property in defiance of laws of the land. Yet we all recognize that there is a distinction between these acts. As Mr. Justice GRIER most aptly says: "ALEXANDER THE GREAT may be classed with robbers by moralists, but still the political distinction will remain between war and robbery."³ The robber and the soldier both set the law of their victims at defiance, but there is this vital distinction between them: one acts for his own private end without a pretence of right, the other acts primarily for a public and general purpose, and always with a pretence of having right and justice on his side. With more or less clearness, this distinction has always been recognized by the profession in this country, and, practically, has invariably

¹ Opinion of Mr. Justice FIELD in *U. S. v. Greathouse*, 2 Abb. Ca. Ct., 372.

² P. D. 407, § 28.

³ Op. *U. S. v. Hanway*, 2 Wall. Jr., op. p. 205.

been enforced by the courts in every case which has come before them. A cursory glance at the decisions on this subject will be sufficient proof of this statement.

The first indictments for treason against the United States were those found against some of the participators in what are known as the whisky disturbances of 1794. In 1791 and '92 Congress had passed an excise law affecting distillers, of whom there were a large number in the western part of Pennsylvania.¹ The Act was very unpopular in that section, until finally discontent broke out into an armed opposition, which required the whole energy and force of the newly established Federal Government to suppress. The nature and character of the opposition is seen from the preamble of a resolution passed by "A Meeting of Sundry Inhabitants of the Western Counties of Pennsylvania,"² in which it was declared that "a tax on spirituous liquors is unjust in itself, and oppressive upon the poor; and that internal taxes upon consumption must, in the end, destroy the liberties of any people." Many of those who took part in the disturbances could not have any direct interest in the distilleries themselves. The purpose of the inhabitants of the western counties was plain; they intended to prevent the enforcement of the law, because they denied to the government the power or right to pass such a law. Judge PATTERSON, who presided at the trial, therefore practically condemned the rioters when he said: "If its (the insurrection's) object was to suppress the excise offices and to prevent the execution of an Act of Congress, by force and intimidation, the offence in legal estimation is high treason; it is the *usurpation of the authority of government*; it is high treason by levying war."³

Similar in its main outlines to the case above quoted is that of the trial of the Northampton Insurgents who had by force and arms resisted the collection of the Federal tax on houses and lands.⁴

¹ Acts of March 3, 1791, and May 7, 1792.

² Wh. State Trials, p. 107.

³ Wh. State Trials, p. 182.

⁴ Act July 9, 1798.

They were convicted of treason, one Fries being convicted twice.¹ Judge PETERS in his charge to the jury said: "It is treason in 'levying war against the United States' for persons *who have none but a common interest with their fellow citizens*, to oppose or prevent, by force, numbers or intimidation, a public and general law of the United States with intent to defeat its operation or compel its repeal."

These italicised words indicate the true line of distinction between treason and mere robbery, murder or other crime. In one case the primary interest must not be for private gain; it must be an opposition based on principle, however false and mistaken that principle may be. Thus the smuggler who, in attempting to land his goods and escape gives battle to the revenue cutter, defies the law, and enters into armed resistance to authority; but he does not commit treason, he does not try to annul the revenue Act, but simply to break the law for his own private gain. Again, the highway robber breaks the law regarding private property, but he does not commit treason. As between the government and the individual, he is perfectly willing that the individual should own property. He simply desires to appropriate another's property for his own ends, and not for the purpose of annulling the laws respecting private property. He may combine with others to rob, murder or steal, but the fact of their combination does not make their act treason. Combination to break a law is not itself treason. It depends on the intent with which the combination was formed.²

Thus where a body of men fully armed disregarded the embargo laid on the exportation of goods to Canada and captured from the marshall a raft laden with goods, taking the same into Canada, it was held not to be treason although the men carried on a regular battle with the troops while escaping with the raft.³ Judge LIVINGSTON, in his remarks to the jury on the trial, said: "If the Court does not

¹ Wh. State Trials, p. 584.

² Wh. State Trials, p. 456, 610.

³ U. S. v. Hoxie, 1 Paine's Cr. Ct., 265.

greatly err, no construction in England, and certainly none in America, has yet carried this doctrine the length to which we are expected to go. . . . It is impossible to suppress the astonishment which is excited at the attempt which has been made to convince a court and jury of this high criminal jurisdiction, that between this and levying war there is no difference."¹ The same principle was recognized and enforced in the celebrated case of the United States *v.* Hanway,² which grew out of the fugitive slave law. A Marylander, named Gorsuch, desiring to recover a runaway slave, procured, under the Act, a warrant from the United States Court in Philadelphia for the arrest of the slave. Armed with this warrant, and in company with a deputy marshall, he attempted to arrest his slave in a village called Christiana, near the town of West Chester, "a place infested with abolitionists." He found the slave in a house with many other blacks. Hanway, a white man of avowed abolitionist sentiments, was on horseback near the house. The negroes and the marshall's party fired on each other, the negroes escaped and the slave-owner was killed. On the ground that he had taken part in this disturbance Hanway was arrested and tried before the late Mr. Justice GRIER for treason against the United States. That learned jurist was of the opinion that the acts in question were not treasonable, even if Hanway had taken part in them. "A number of fugitive slaves may infest a neighborhood and may resist with force and arms their master or the public officer who may come to arrest them; they are guilty of felony and liable to punishment, but not as traitors. *Their insurrection is for a private object, and connected with no public purpose.*"³ That some of the blacks or Hanway himself may have believed the fugitive slave law wrong and desired its repeal, did not make an act whose primary and principal intention was the liberation of a particular slave treasonable. The vast majority of those who participated

¹ Op. p. 270 and 373.

² U. S. *v.* Hanway, Wall Jr., 139.

³ U. S. *v.* Hanway, 2 Wall J., p. 205.

combined and fought for the purpose of preventing their friend from being carried back into slavery, and it could not be proved that their principal object was to emphasize their objection to a particular law of Congress or to its power to pass such a law.

With this statement of the principles by which we should test acts to determine whether they are treasonable or not, and the practical illustrations of the few cases which have occurred, let us return to the Homestead rioters. Before, under the law, a conviction can be obtained, the State must prove that a decided majority of those who took part in the riots did so, not only from a desire to be personally reinstated in the Carnegie Mills, but from a desire to emphasize their belief in the principle that a man who works in an iron foundry has a vested interest in his position, of which the managers cannot deprive him without the consent of a union composed of iron workers, and from a desire to emphasize his hatred of those principles of the law of the State of Pennsylvania which allow the owners of iron foundries to discharge their workmen and take others, irrespective of the wishes of the rest of their employees. It will be impossible to tell till the trial whether the State can prove all this. If not thoroughly proved, let us hope the jury will take to heart the warning of the Supreme Court of the United States, "That it is more safe, as well as more consonant to the principles of our Constitution that the crime of treason should not be extended by construction to doubtful cases." On the other hand, if it is clearly proved that this was an armed attempt to change the laws of the State, let us also hope, for the present dignity and future peace of our Commonwealth, that the jury will not shrink from their duty to convict. With the wisdom or the justice of the laws as they exist the jury will have nothing to do. If the people do not like the laws, let them change them by their ballots, not by their bayonets.

ADDENDUM.

Since the above was written, the Chief Justice of Pennsylvania presiding over a Court of Oyer and Terminer,

has defined "treason" under the laws of the State. In speaking of what the State had to show in order to make the acts of the Homestead Rioters treason, we presumed that the line dividing treason from other crimes would be drawn by the courts of the State as it had been in the Federal Courts, seeing that the statutes of the State defining treason were almost identical with that crime as defined in the Constitution of the United States. In this, at least as far as the Chief Judicial Officer of the State is concerned, we were mistaken. The criterion of treason against the State, as defined by that learned jurist in his clear and concise charge to the Grand Jury, is not that the act shall have been done for a public as distinguished from a private purpose, but that there should be *organized resistance to the authority of the State*. He says:

"A mere mob collected upon the impulse of the moment, without any definite object beyond the gratification of its sudden passions, does not commit treason, although it destroys property and attacks human life. But when a large number of men, arm and organize themselves by divisions and companies, appoint officers and engage in a common purpose to defy the law, to resist its officers and to deprive any portion of their fellow-citizens of the rights to which they are entitled under the Constitution and laws, it is a levying of war against the State, and the offense is treason; much more so when the functions of the State Government are usurped in a particular locality, the process of the Commonwealth and the lawful acts of its officers resisted, and unlawful arrests made at the dictation of a body of men who have assumed the functions of a government in that locality, and it is a state of war when a business plant has to be surrounded by the army of the State for weeks to protect it from unlawful violence at the hands of men formerly employed."

Treason here consists in the "appointing of officers" and "engaging in a common purpose to defy the law." The defying the law in a certain manner, *i.e.*, by organization,

is made the test, and not the purpose for which the law is defied. Thus, A's robbery, or B's resistance to the law, would not be treason, unless the robbers combined in sufficient force to require "the plant of companies to be surrounded by the armies of the State for weeks;" but, then, though private gain be the motive, it is treason against the State. Conducting an illicit distillery is not treason; but if several persons engaged in the business combine to resist arrest, their act becomes treason.

Now this idea of the main constituents of treason is something very different from what Mr. Justice CHASE had in his mind when he said in his charge at the trial of the Northampton Insurgents: "You are to consider with what *intent* the people assembled at Bethlehem,¹ whether for a *public or private purpose*."

It is not the treason of Mr. Justice GRIER, when he said, speaking of the Christiana negroes, who had combined to prevent the capture of one of their number: "Their insurrection, their violence, however great their number may be, so long as it was to attain some *personal or private end of their own*, cannot be called levying war." The word "combination" had no place in this jurist's definition of treason, as he says: "A whole neighborhood of debtors may *conspire* together to resist the sheriff and his officers. . . . They may perpetrate their resistance by force; may kill the officer and his assistants, and yet they will be liable only as felons."²

Nothing, indeed, could show more clearly the difference between the idea of treason heretofore existing, and treason as defined by the Chief Justice of Pennsylvania, than the following from the opinion of Judge CHASE: "The true criterion to determine whether acts committed are treason, or a less offense (as a riot), is the *quo animo*, or the *intention* with which the people did assemble. Whether the intention is universal or general, as to effect some

¹ Wh. State Trials, p. 635; U. S. v. Hanway, 2 Wall., Jr., 205.

² Ibid.

object of a general public nature, it will be treason, and cannot be considered, construed or reduced to a riot. . . . The *intention*, with which any acts (as felonies, the disturbances of property or the like), were done, will show us to what class of crimes the case belongs.”¹

With one jurist the criterion is the intention—a subjective fact; with the other, it is the objective fact of the *combination to defy the law*.

Perhaps lawyers are not the best judges of the respective merits of what we may now call the Pennsylvania idea of treason, (unless the majority of the Supreme Court of the State are not satisfied with the criterion as laid down by Mr. Chief Justice PAXSON), and of the criterion which has heretofore invariably governed the Courts of the United States. We may be too apt to look at questions which touch knotty social questions from a legal point of view solely. But unquestionably from such a standpoint there has been substituted for a clear cut criterion of treason—the private or public object of the Act, the uncertain and shifting criterion of whether the resistance of the law was an *organized resistance*. The law of treason becomes, like the law of negligence, always doubtful, because depending on the particular circumstances of each case. What would be a sufficient organization to amount to treason under some circumstances, might not be sufficient under others. As indictments for treason come usually after times of great popular excitement, and when “several hundred thousand dollars of the taxpayer’s money has been expended in maintaining order,” it is to be feared that the “law of treason” in its future development in the State of Pennsylvania, will depend, in no small degree, on the amount of public indignation aroused by the resistance to lawful authority.

From what has been said we do not wish to be understood as criticising the officers of the State in bringing these indictments for treason. If it can be proved by the State,

¹ Wh. State Trials, p. 364.

as is alleged in the daily newspapers, that the Advisory Committee of the Homestead rioters were at pains to declare to the world that their primary object was to show to the citizens of the State and its government that an employer must deal with representatives of organized labor; then, under either criterion, the members of the Board, together with everyone who directly or indirectly took part in the riots, are guilty of treason against the Commonwealth of Pennsylvania, and should be both indicted and convicted. In what we have said we simply wish to express regret at the introduction of a new criterion of treason.

THE MEMBERSHIP OF THE NEXT ELECTORAL COLLEGE.—In view of the nearness of the Presidential election it is of interest to learn that the proper number of electors to which each State is entitled has been questioned. The Constitution on this point says: "Each State shall appoint in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be *entitled in Congress*."¹ Apparently nothing could be more simple or plain. And yet it so happens that the present Congress was elected in 1890, and the number of Representatives sent by each State depends on the Apportionment Act of February 25, 1882. The present Congress, however, has passed a new Apportionment Act, based on the census of 1890. The Congress to be elected on the 8th of next November will contain more members than the present Congress. The number now is three hundred and thirty one, with one vacancy and four territorial delegates. The membership of the Fifty-third Congress will be three hundred and fifty-six Representatives and eighty-eight Senators. The Electoral College, as based upon this apportionment, will be four hundred and forty-four, while on the basis of the present Congress it would be only four hundred and twenty. The question presented by these facts, therefore, is by which

¹ Art. II, Sec. 1-2.

Congress shall we determine the number of electors to which any State is entitled—by that Congress which exists to-day, or by that Congress which we elect on the day of the election of the Presidential electors. The use of the word “entitled” in the Constitution without any qualification as to whether the Congress actually in existence was meant or not, was very unfortunate. In fact there is no conclusive way of logically determining the matter. To us, if the question could fairly be considered open, we confess the expression “is entitled” would seem to indicate that a present, actually existing Congress at the time the electors met was contemplated. Though even here the reason, even if sound, is not conclusive as at the time the mythical and now largely nonsensical college which never meets, “meets,” two Congresses may be said to be in existence—the actual sitting and voting Congress and the newly-elected Congress which comes into legal existence on the 4th of March following. However, where the possible ambiguity is patent to all, and the only thing of vital importance to the country is to have the matter definitely settled, the interpretation put on this clause of the Constitution, by the men who had seen its adoption, and in some instances had helped to make its provisions, should be respected, especially where their interpretation has been silently acquiesced in for one hundred years. On March 1, 1792, probably in view of a similar state of facts to that in which we now find ourselves, Congress passed the following Act: “The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice-President to be chosen come into office; except that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment.”¹ The interpretation of the provision is plain. The word “entitled,” in the estimation

¹ Rev. Stat., 132.

of the men who passed this Act, referred to the number of Representatives which each State would have a right to elect under the existing apportionment law, and, therefore, not necessarily numerically the same as their actual representation in the Congress in existence at the time the election takes place or the Electoral College "meets."

This interpretation, while by no means as conclusive as many of the daily papers have treated it—the Supreme Court alone having the power to interpret the Constitution—is nevertheless perfectly reasonable. There is nothing which would lead us to say it was *a priori* impossible. As a practical solution there is much to be said in its favor; and happily there is little doubt but that both parties will quietly acquiesce in it.

THE DEATH OF PRESIDENT AND VICE-PRESIDENT.—

The time of a presidential election is perhaps as good a one as any other to point out a duty of Congress, with reference to the office of President, which that body has neglected ever since 1886. In case of the death of both the President and the Vice-President, the law of January 19, 1886, provides, that the different members of the Cabinet in the usual order of precedence, shall temporarily fill the office until their *successor is elected*. Previous to this Act, the acting President of the Senate, and failing him the Speaker of the House of Representatives, was to become the acting President. The change was due to the manifest unfairness of the possibility that under such an order of succession one of the opposite party of the deceased President and Vice-President might become President, and to the evident danger of their being no acting President of the Senate, the Vice-President by hypothesis being dead, or that the House should not as yet have organized and elected a speaker. But under the old law there was provision for the election in the usual way, within a reasonable time, of a new President and Vice-President. The acting President of the Senate and the Speaker of the House were only to

act *ad interim*. This was evidently in accordance with what we may almost call the direct mandate of the Constitution as expressed in the sixth paragraph of the first section of the Second Article: * * "and the Congress may by law provide for the case of removal, death, etc., both of the President and Vice-President, declaring what *officer* shall then *act as president*, such *officer* shall then act accordingly, until the disability be removed, or a President *shall be elected*." The intention of the Constitution is shown not only from the last words italicised, but from the fact that Congress in its choice of an acting President is confined to an *officer* of the government, designated by law. The law of 1886, however, repeals the sections of the Revised Statutes—"146-156"—which provide for the election of another "College," and as yet Congress has substituted nothing in their place. A Cabinet officer, taking the position of President, would, therefore, continue to act as President until the 4th of March following the next quadrennial election, unless Congress provided for an election of his successor. This it could not do without passing "a law," which like other laws would have to receive the approval of the cabinet officer as acting President. In most instances this would be like asking a man to sign his own death warrant. As the law stands at present, therefore, in case of the death of both President and Vice-President, the evident intention of the Constitution, which was that the people should elect a college to select a new President for the unexpired term, would be defeated, and a mere cabinet officer, an appointee of the former President, might hold the highest office in the State for nearly four years.

Of course there is no remedy for the defeat of the spirit of the Constitution by the non-action of Congress. It is as if Congress should fail to provide for the enumeration of the people every ten years. There would be no help for it. A people can tell their representatives what they shall not do, but they cannot force them to pass a law, and still retain their character as a deliberative assembly.

BOOK REVIEWS.

BY G. W. P.

A TREATISE ON THE LAW OF NON-RESIDENTS AND FOREIGN CORPORATIONS, AS ADMINISTERED IN THE STATE AND FEDERAL COURTS OF THE UNITED STATES. BY CONRAD RENO. Chicago, T. H. Flood & Co., 1892.

This work attempts a classification of the many decisions that discuss the rights of a citizen of the United States who sues or is sued in a court other than that of the State in which he resides. To accomplish his purpose the author of such a work must meet and surmount many obstacles. The cases upon which he must build up his treatise lie scattered through the reports of our fifty-one States and through the United States reports, so that he is certain to meet with contradiction and difference of opinion. The decisions are complicated in many instances by the fact that the Court is at the same time deciding two questions of substantive law—one growing out of the cause of action, the other relating to the rights of the non-resident—and also a question of procedure, which often remains to be considered when the other phases of the case have been disposed of. In addition to these difficulties, the author is likely to be tempted by the importance of some particular application of a general principle to vitiate his classification by treating the species as if it were the genus. To this temptation Mr. RENO has occasionally yielded, although upon the whole the arrangement of his book is reasonably logical and consistent. Chapter I deals with a "Non-resident's Right to Transact Business;" Chapter II discusses "Qualifications and Exceptions" to the general conclusions theretofore drawn; Chapter IV is entitled, "Right to Sue and Liability to Suit;" while Chapter III, exhibiting the fault adverted to above, is concerned with "*Investments of Non-residents.*" So much of this third chapter as deals with various questions of taxation should have been separately treated under an appropriate heading, and had this course been followed the author would probably have been led to treat the subject of taxation with greater fullness, which would have been an advantage. So

much of the chapter as deals with *Gelpcke v. Dubuque—et omne id genus*—either ought to have been discussed under Chapter VI, "The Choice of Courts—State or Federal," or the discussion ought to have been omitted altogether. For if that inconsequent decision is understood to establish a right in favor of a non-resident, it naturally finds its place among the exceptions to the so-called general rule that the Federal courts will follow State law. Indeed, Mr. RENO is forced to refer to it again in this connection in a foot-note to page 93. If, on the other hand, that decision is seriously looked upon as an exercise of the jurisdiction to prevent the impairing of the obligation of contracts, then it has nothing to do with non-residents as such; for the protection of the Federal courts might ultimately be sought in such a case as well by the home citizen as by the foreigner. In the foot-note already referred to Mr. RENO says: "The true ground of this disregard of State decisions is not entirely free from doubt. The author inclines to the view, however, that the true ground is that such overruling State decisions, rendered after the making of the contract in suit, impair the obligation of the contract and violate the national constitution; and therefore the laws of the several States are not 'rules of decision' in the Federal courts, because the Constitution 'otherwise requires or provides.'" But the Constitution of the United States merely provides that no State shall *pass any law* impairing the obligation of contracts, and one would suppose that the use of the word "pass" indicates that the reference is to legislative and not to judicial action. No such modifying word restricts the language of the Judiciary Act of 1789, from which Mr. RENO here quotes, for that Act declares that the laws of the States shall constitute rules of decision. But Mr. Justice STORY in *Swift v. Tyson* decided that this signified only the *statute* laws of the States. If, therefore, the broad language of the Judiciary Act of 1789 refers only to legislative action, how can Mr. RENO be right in suggesting that the restricted language of the Constitution extends further and contemplates judicial action as well?

The seventh chapter of Mr. RENO's work is entitled "Suits in Federal Courts;" the eighth deals with the "Locality of Suits in United States Circuit Courts;" the ninth with "Attachment and Garnishment;" the tenth with "The Title of Assignees in Insolvency and Receivers as against Attaching Creditors;" and the eleventh and twelfth with "Judgments by Default against Non-residents." The three concluding chapters are concerned respectively with "Divorce," "State Insolvent Laws" and "Statutes of Limitation." These chapter titles will give our readers a general idea of the scope of the work. The portions of it which treat of attachment and garnishment and of judgment seem to us to be particularly valuable, while in the chapter on "Statutes of Limitation" the author has compressed a great deal of useful information into a small space. As appears from the title of his work, Mr. RENO has paid special attention to the liabilities and immunities of foreign corporations, and the profession will find in those pages which are concerned with this topic a clear and succinct summary of the law pertaining to these juristic "non-residents."

There are many minor points of excellence in the book which indicate careful and thorough investigation on the part of the author. Thus, to mention one instance among many, we are glad to note that Mr. RENO does not fall into the common error of suggesting discrimination between residents and non-residents as an essential vice of State regulation of interstate commerce. He properly quotes Mr. Justice BRADLEY'S language in *Robbins v. Shelby Taxing District* as practically overruling *Hinson v. Lott* and the earlier cases on this point.

The book is provided with a complete index, which includes a valuable table of "Cases Overruled, Revised and Criticised." The table of cases cited conforms to the usage established by the best modern text-books and gives after each case a reference to the report as well as to the page on which it is cited. The publishers have done their work well and the book presents an attractive appearance.

BOOKS RECEIVED.

THE ROMAN LAW OF TESTAMENTS, CODICILS AND GIFTS IN THE EVENT OF DEATH. By MOSES A. DROPSIE. Philadelphia: T. & J. W. Johnson & Co., 1892.

THE LAW OF MANDAMUS. By S. S. MERRILL. Chicago: T. H. Flood & Co., 1892.

SELECT CASES ON EVIDENCE AT THE COMMON LAW, WITH NOTES. By JAMES BRADLEY THAYER, LL.D., Professor of Law at Harvard University. Cambridge: Charles W. Sever, 1892.

A TREATISE ON THE LAW REGULATING THE MANUFACTURE AND SALE OF INTOXICATING LAW. By HENRY CAMPBELL BLACK, M.A. St. Paul, Minn.: West Publishing Co., 1892.

LEADING CASES UPON THE LAW OF TORTS. Selected by GEORGE CHASE, LL.B., Professor of Law in the New York Law School. St. Paul, Minn.: West Publishing Co., 1892.

ABSTRACTS OF RECENT CASES.

[Selected from the current of American and English Decisions.]

BY

HORACE L. CHEYNEY, HENRY N. SMALTZ, JOHN A. MCCARTHY.

AGENCY—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT—MERCANTILE AGENCIES.—A bank entered into an agreement with a mercantile agency whereby the latter agreed to furnish to the former such information as they might possess concerning the mercantile standing and credit of merchants, etc., stipulating, however, that they should not be responsible for any loss caused by the negligence of any of their employees in procuring, collecting and communicating said information, and that the correctness of information was not guaranteed by them. The bank made application to the agency for information as to the standing of a certain merchant. In response to this call the agent of the mercantile agency knowingly made a false report for the purpose of deceiving the bank and benefiting the merchant. The bank relied upon this information, and sustaining loss in consequence, brought suit against the mercantile agency and a verdict against them was sustained, the Court holding that a principal is civilly liable for the fraud and deceit of his agent, which is committed for the principal, in the course of business and is a part of the agent's employment, and within the scope of his authority, though in fact the principal is ignorant of the act, and this liability is not changed if the agent makes the fraudulent representations not for his employer, but for his own interest and to serve his own private

ends: *City National Bank of Birmingham v. Dud*, Circuit Court of the United States, Southern District of New York, July 16, 1892, *SHIPMAN, J.* (51 Fed. Rep., 160).—*H. L. C.*

ARBITRATION—REVOCATION OF SUBMISSION.—Two railway companies agreed in writing to submit certain matters to arbitration. Before the award was signed and published, the defendant corporation delivered to the arbitrators a written revocation of their authority to proceed under the submission, signed by its president, and accompanied by the vote of the directors certifying his act. The award having been subsequently signed and published by the arbitrators, an action was brought on the award by the plaintiff corporation. *Held*: That the papers executed by the defendant corporation operated as an unconditional revocation of the authority of the arbitrators, as they had not then executed their powers by publication of the award; and this was negatived neither by the fact that it was agreed that the arbitration might proceed *ex parte* if either party failed to appear, nor by the fact that, before the revocation, the arbitrators had orally announced their decision in respect to certain items in the defendant's statement of claims, as an award must cover all claims submitted and must be mutual, certain and final: *Boston and L. R. Corp. v. Nashua and L. C. Corp.*, Supreme Judicial Court of Massachusetts, June 27, 1885, per *FIELD, J.* (31 N. E. Rep., 752).—*H. N. S.*

ATTORNEY AND CLIENT—CHAMPERTY—WHAT CONSTITUTES.—An attorney entered into an agreement with his client whereby in consideration of the assignment of a judgment to him by his client, he agreed to render legal services in its prosecution and to advance the amount necessary for the expenses of the case, one half of said expenses to be paid by the client if the suit was unsuccessful, and if successful the net proceeds of the judgment to be equally divided. This assignment was attacked by the client's assignee for the benefit of creditors. *Held*: That the contract was not without consideration, nor unlawful on the ground of champerty: *Reece v. Kyle*, Supreme Court of Ohio, June 20, 1892, per *SPEAR, C. J.* (31 N. E. Rep., 747).—*H. N. S.*

COMMON CARRIERS—DUTY TO STOP TRAIN.—Where a conductor on a train collected a fare to a particular station from one of the passengers, while the train was still within the corporate limits of the city where the passenger had boarded the train, it is his duty to stop the train at the particular station, and failing to do so is a breach of the carrier's public duty, and renders it liable to an action for tort as well as an action on the contract. The Court added: "It was his duty, if he did not intend to stop at the station to tell the passenger so, decline to take the money, stop the train at once, and allow the passenger to get off in the city." *Caldwell v. Richmond & D. R. Co.*, Supreme Court of Georgia, April 27, 1892, *LUMPKIN, J.* (15 Southeastern Rep., Vol. 15, p. 678).—*W. D. L.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—ORIGINAL PACKAGE.—Removing the lid of an original package of oleomargarine, so that it may be examined, is not such a breaking of the package as will destroy its character as an original package: *In re McAllister*, Circuit

Court of the United States, District of Maryland, June 11, 1892, BOND, J. (57 Fed. Rep., 282).—*H. L. C.*

CONTRACT—FRAUD.—The suit was brought to recover damages for an injury. It was in evidence that the plaintiff signed a document releasing the defendants from further liability in consideration of the payment of a sum of money, which sum had been received by the plaintiff. The plaintiff, an illiterate person, testified that when he signed the document the contents was not read to him, and he thought it was an ordinary pay roll. The judge who presided at the trial held that as the plaintiff did not make a tender of the amount received the jury should find for the defendants. *Held*: Error. If the plaintiff had knowingly given a release, and had sought to set aside the same on the ground of fraudulent representation, a tender would have had to have been made of any benefit he had received under the contract containing the release; but as the contention of the plaintiff was that he did not know he was signing an instrument purporting to contain a contract in reference to his injury, a tender of the amount received was not necessary. New trial granted: *Butler v. Richmond & D. R. Co.*, Supreme Court of Georgia, November 23, 1891, BLECKLEY, C. J. (15 Southeastern Rep., 669).—*W. D. L.*

COPYRIGHT—DRAMATIC COMPOSITION—STAGE DANCE.—A stage dance, popularly known as the "serpentine dance," and illustrated by a unique combination of lights, shadows and dress, is not a dramatic composition within the meaning of the Copyright Act: *Fuller v. Bemis*, Circuit Court S. D., New York, June 18, 1892, LACOMBE, J. (50 Fed. Rep., 926).—*J. A. McC.*

CORPORATIONS—CORPORATE NAME—INJUNCTION.—The fact that the word "Hygeia" was used by a water company prior to plaintiff's organization; will prevent it from restraining a third company's use of the same word in its corporate title: *Hygeia Water Ice Co. v. New York Hygeia Ice Co.*, Supreme Court of New York, June 29, 1892, O'BRIEN, J. (19 N. Y. S., 602).—*J. A. McC.*

DOWER—DIVESTMENT OF BY SUIT IN PARTITION.—A wife is divested of dower in land owned by her husband in common with others by partition thereof in a suit to which her husband is a party, though she is not joined; and such is the case also where before the suit he had conveyed his undivided interest, he and his granter, but not his wife, being joined as parties: *Holley v. Glover*, Supreme Court of South Carolina, July 14, 1892, McIVER, C. J. (15 Southeastern Rep., 605).

EQUITY—LACHES.—In an action to vacate a voluntary deed, conveying in trust for the grantor and others property received absolutely under her grandfather's will, evidence that the grantor a few months after its execution was advised by legal counsel, that, while unusual in its provisions, it was unimpeachable; that some years later her father told her that he also had taken and received similar advice thereon; that upon a second opinion, taken more than twelve years after, favorable to its impeachment, she promptly brought action, negatives her laches and

acquiescence: *Whitridge v. Whitridge*, Supreme Court of Maryland, June 7, 1892, MCSHERRY, J., (O'BRIEN, J., diss.) (24 At. Rep., 645).—*J. A. McC.*

HABEAS CORPUS—REMOVAL OF PRISONER—JURISDICTION OF CIRCUIT COURT.—A Federal Court has jurisdiction on *habeas corpus* where a person who has been arrested upon a warrant based upon an indictment found in another circuit and is awaiting removal, to look into the indictment, so far as to be satisfied that an offence against the United States is charged and that it is such an offence as may be lawfully tried in the forum to which it is claimed the accused should be removed: *In re Terrell*, Supreme Court of the United States, Southern District of New York, June 28, 1892, LACOMBE, J. (51 Fed. Rep., 213).—*H. L. C.*

INJUNCTION—LABOR UNIONS—INTIMIDATION OF EMPLOYEES.¹—Where the members of a labor union are interfering with the working of the complainant's mine, and by force, threats and intimidation are preventing employees from working therein, a court of equity will restrain by injunction such labor union and the members thereof from committing such acts if the defendants are insolvent and the threatened acts are such that their frequent occurrence may be expected. The rule that a trespass cannot be enjoined unless upon realty and when the damage is irreparable, and the right at law must have been established, has no application, as no title to realty is involved, and the acts complained of are not a direct trespass upon realty, but only such as indirectly affect the enjoyment of property and other rights. Nor has the rule that equity will not interfere for the prevention of crime any application, the acts complained of not being criminal *per se*, but unlawful only, but which may lead to the commission of other acts purely criminal: *Cœur Dalene Consolidated and Mining Co. v. Miners' Union of Wander, et al.*, Circuit Court of the United States, District of Idaho, July 11, 1892, BEATTY, J. (51 Fed. Rep., 260).—*H. L. C.*

INTOXICATING LIQUORS—ORIGINAL PACKAGE.—On the trial of an indictment for selling liquor in violation of law, the defendant's testimony tended to show that he was the agent of a principal who carried on business in another State, and the latter delivered the liquor to a railway company for transportation in bottles, each bottle being enclosed in a paper bag. The company without defendant's knowledge placed the bottles in boxes, and defendant so received them. *Held*: that the bottles and not the boxes were original packages, as they had been received by the carrier as such, and the packing into boxes was without the knowledge of the consignor: *Tinker v. State*, Supreme Court of Alabama, June 21, 1892, per THORINGTON, J. (11 So. Rep., 383).—*H. N. S.*

MECHANICS' LIENS—RIGHTS OF SUB-CONTRACTOR.—A sub-contractor does not lose his right to file a lien on a building by the failure of the principal contractor to keep his agreement with the owner to deliver the building free of all liens, which was entered into after the sub-

¹ For a criticism of this class of cases, see *AMERICAN LAW REGISTER AND REVIEW*, January, 1892. (1) "Equity Jurisdiction as applied to Crimes and Misdemeanors," by R. C. McMurtrie, Esq.

contractor began work, and of which he had no notice: *Cook, et al. v. Williams, et al.*, Supreme Court of Pennsylvania, July 13, 1892, per STERRETT, J. (24 Atl. Rep., 746).—*H. N. S.*

NEGLECT, CONTRIBUTORY—PASSENGER IN PRIVATE VEHICLE.—One who while riding in the private carriage of another at his invitation, is injured by the negligence of a third person, may recover against the latter, notwithstanding the negligence of the owner of the carriage in driving his team may have contributed to the injury, where the person injured is without fault and has no authority over the driver: *Union Pacific Railway Co. v. Lapsby*, Circuit Court of Appeals of the United States, Eighth Circuit, June 13, 1892, SANBORN, J. (51 Fed. Rep., 174).—*H. L. C.*

NEGOTIABLE INSTRUMENT—NOTICE OF PROTEST—RELEASE.—In an action by a holder against the endorser of a promissory note, it was held: (1) That the fact that the holder enclosed a notice of protest in an envelope, with a direction to return to the sender, if not called for in so many days, printed thereon, and addressed the envelope to the indorser by street and number, and deposited it in the mail box; and that the letter was never returned to him is sufficient to charge the indorser; (2) part payment by the maker of an overdue note was insufficient consideration to support a promise to extend the time of payment, and the indorser is not thereby discharged: *Manchester v. Van Brunt*, City Court of New York, July 1, 1892, O'BRIEN, J. (19 N. Y. S., 685).—*J. A. McC.*

SALVAGE—PILOT-BOAT—PUBLIC POLICY REGULATING COMPENSATION.—Where a steamship went ashore, through fault of her pilot, and salvage service, in pulling her afloat, was rendered by the pilot boat attending to take off the pilot. Held: That it was against public policy that a liberal salvage award should be made to the pilot boat under the circumstances: *The Relief*, District Court of the United States, District of Maryland, July 2, 1892, MORRIS, J. (51 Fed. Rep., 252).—*H. L. C.*

TRUSTS—MINGLING TRUST FUNDS—ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES.—A trustee who had been directed by the Court to invest the trust fund in real estate mortgages, allowed a firm, of which he was a member, to use these funds without furnishing the security upon which he was authorized to lend them. Shortly after, the firm became insolvent, and executed a mortgage to secure these funds, on the same day that they executed an assignment for the benefit of creditors. A bill was filed, the object of which was to declare the execution of the mortgage part and parcel of the general assignment. Held: That in the absence of an agreement in writing, given by the firm at the time the loan was made, to secure repayment of the money by a lien on particular property, which can be identified, the *cestui que trust*, has no more than the rights of a simple contract creditor, and the firm cannot prefer him in an assignment. While the law permits an insolvent to prefer one or more creditors by sale of property in satisfaction of debts, yet a preference in a general assignment, or a mortgage, in which cases

some interest to the debtor remains in the property, is void: *Ellison, et. al., v. Moses, et. al.*, Supreme Court of Alabama, May 17, 1892, *Per WALKER, J.* (11 So. Rep., 347).—*H. L. C.*

WILLS—POWERS IN EXECUTION REVOKED REVIVES PRIOR EXECUTION.—A life tenant, with power to dispose of the land by deed or will, first made a will disposing of the land, and then executed a deed retaining a bond and mortgage. Subsequently, the land was reconveyed to the grantee in satisfaction of the bond and mortgage. *Held*: That the deed was rescinded by the reconveyance, that the power of the life tenant to dispose of the property, was not exhausted thereby; and, therefore, the prior execution of the power by will remained in full force and effect: *Burkett v. Whittemore*, Supreme Court of South Carolina, July 30, 1892, *McIVER, C. J.* (15 Southeastern Rep., 616).—*W. D. L.*

ADDENDUM.

INTERSTATE COMMERCE COMMISSION—DISCRIMINATION IN RATES.
—Since the above went to press we have received the following important decision relative to the powers of the Interstate Commerce Commission in Circuit Court for the Southern District of New York. The decision is as follows: Upon the petition of the Interstate Commerce Commission was filed in the court under the sixteenth section of the Act to regulate commerce, for the enforcement of its order requiring the defendant to cease and desist from carrying any article of imported traffic shipped from any foreign port upon through bills of lading to any place within the United States at any other than the same rates established by the inland tariff of the defendant for the carriage of other like kind of traffic, *Held*,

(1) That the proceeding is not defective because the Southern Pacific Company, a connecting carrier participating with defendant in the carriage between certain points, was not made a party defendant herein. If the defendant is violating a proper order of the Commission it should be restrained from doing so and it cannot escape upon the objection that another wrong-doer is also violating it.

(2) The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation. The order prayed for in the petition is granted: *Interstate Commerce Com. v. Texas & Pacific*, October 5, 1892, *per WALLACE, J.*

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THE BRITISH SIDE OF THE BEHRING SEA
CONTROVERSY.¹

BY LAWRENCE GODKIN, ESQ.

It is proposed in this article to state briefly some of the arguments which the British government may advance in its controversy with the United States over the seal fisheries in the Behring Sea. It will be assumed, for the purposes of this discussion, that certain facts will be proved or admitted before the arbitrators, to wit: that a large amount of capital belonging to citizens of the United States is invested in the seal fisheries of Behring Sea; that many citizens of the United States are engaged in that industry; that the fur bearing seals inhabit the shores of Alaska, but migrate to the Prybyloff Islands to breed, and that these islands are owned by the United States; that British subjects have been killing female seals in breeding time in the law of open waters of the Behring Sea surrounding the Prybyloff

¹ Mr. Stephen B. Stanton, in the December number, will present the American side of the controversy. See the statement of the case by Henry Flanders, Esq. in the September issue of THE AMERICAN LAW REGISTER AND REVIEW.

Islands, and outside of what is commonly known, in the territorial jurisdiction, as the three-mile limit; and that the circumstances under which these British subjects take the seals are such as have resulted in a distinct diminution in the number of seals in the Behring Sea, and will eventually result in their extermination.

It is believed that the foregoing statement fairly presents the contention of the United States, in so far as these facts are concerned, but although these facts will be considered as admitted for the purposes of this article, it should be borne in mind that they have not been admitted, as yet—at least without considerable qualification—by Great Britain.

From an examination of the correspondence between Mr. BLAINE and Lord SALISBURY, and of various writings including Mr. PHELP'S able article in *Harper's Magazine*, in which the claims of the United States have been set forth, it would appear that, when analyzed, the present condition of the United States, on the law, is that this government has a right to prevent British subjects from killing seals in Behring Sea outside the three-mile limit, for three reasons: 1st, because, owing to the *habitat* and habits of the Alaskan seal, and the circumstances surrounding the seal industry in Behring Sea, the people of the United States have a right of property in the seals which is not divested when they wander beyond the three-mile limit; 2d, because it is *contra bonos mores* for the subjects of any nation to kill animals so useful to all nations under circumstances which threaten speedy extermination of the species; 3d, because Behring Sea is, as between Great Britain and the United States, an open or a high sea in a qualified sense only, for the reason that the United States took from Russia certain jurisdictional rights in this sea, which rights had been conceded and acquiesced in by Great Britain.

These propositions will be taken up in the order in which they have been stated, which is, in the opinion of the writer, their order of merit, and first, therefore, let us examine the contention that the United States has a right

of property in the seals. It will be assumed that all seals whose killing by British subjects it is sought to prohibit, are seals which have been born on American soil, or which have their habitation on American soil; for it is scarcely to be supposed that, on the property theory at least, the United States would claim that it has a right to prohibit the killing of Russian seals in Behring Sea. This right might be claimed on one of the other grounds which has been adduced, but not on the theory of property in the seal. Assuming, therefore, that all the seals which have been killed, or which are in danger of being killed, in breeding time by British subjects are American seals, can there be such a right of property in wild seal roaming at large in Behring Sea as will entitle the United States, or any citizen thereof to prohibit the citizens of another State from killing the seal when found without the three-mile limit?

Now, there is no international law, properly so called, on the subject of property in wild animals, and, therefore, we must, to a certain extent, at least, be guided to our determination by the principles and precedents of the common and civil law, and particularly by those of the common law, because that is the system of law which obtains in both the contending countries.

In his letter to Sir JULIAN PAUNCEFORTH of May 22, 1890, Lord SALISBURY said:

"Fur seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius* until they are caught; no person, therefore, can have property in them until he has reduced them into possession by capture."

BLACKSTONE says that an individual may have a qualified property in creatures that are *feræ naturæ* "*propter privilegium*," that is, he may have the privilege of hunting, taking and killing them, in exclusion of other persons, so long as they continue within his liberty; and may restrain any stranger from taking them therein; but the

instant they depart into another liberty, this qualified property ceases.¹

The only way in which one can acquire property in wild animals is by reclaiming them. There are three ways of reclaiming a wild animal: by killing it, and getting possession of the carcass; by getting physical control of it—that is, by getting it in such position that its movements can be controlled—and lastly, by taming it.²

A brief review of some of the practical applications of the above principles by the Courts of the United States may illuminate the question. For instance, bees are not the subject of property until actually hived, and he who first encloses them in a hive becomes their proprietor.³ And doves are wild animals, and not the subject of larceny, unless they are in the owner's custody, as in a dove house, or in a nest, before they are able to fly.⁴ Fish, unless reclaimed, confined, or dead, and valuable for food, are not considered to be property.⁵ One who hunts a fox acquires in it no property merely by the pursuit; and so, if another, in the sight of the pursuer kills it and appropriates it to his use, no action will lie.⁶ And in one of the United States, at least, the common-law right to hunt for animals *feræ naturæ* in the uncultivated and unenclosed grounds of another has been recognized.⁷

And so, in the civil law, it is the rule that there can be no property in wild animals unless they have been reclaimed; and even after they have been reclaimed, the right of property in them can be divested by their escape, unless they are capable of identification.⁸ Now it must be conceded that fur seals are *feræ naturæ*, and

¹ Blackstone's Commentaries, Book 2, Ch. 25.

² Bishop's Criminal Law, Vol. II., sec. 775, 776.

³ Gillet v. Mason, 7 Johnson, 16.

⁴ Commonwealth v. Chase, 9 Pick., 15.

⁵ State v. Krider, 78 N. C., 481.

⁶ Buster v. Newkirk, 20 Johnson, 75.

⁷ Broughton v. Singleton, 2 Nott & McCord, 338; McConico v. Singleton, 5 Mill, South Carolina, 244.

⁸ Grotius, Rights of War and Peace, Bk. 2, Ch. 8.

it can scarcely be contended that the United States has reclaimed the Alaskan seals. It is difficult, therefore, to discover any principle or precedent of municipal law upon which the United States can base a claim to a right of property in the Alaskan seals—at least, when they are beyond the three-mile limit.

But it may be contended that the matter in controversy is not one to be decided by precedents, or want of precedents, or codes, or omissions from codes in municipal law, which confine and narrow the determination of questions of *meum* and *tuum* as between individuals; that the case, under the circumstances under which it has arisen, is to be decided by a higher law and broader principle. This brings us to the consideration of the contention that the killing of the seals is *contra bonos mores*. A satisfactory definition of an act which is said to be *contra bonos mores*, as used by Mr. BLAINE, may be an act which is contrary to some rule of conduct which is recognized by civilized nations to be a rule of conduct *for reasons of morality*. The last three words of this definition are important; for an act may be contrary to some rule of conduct which has been recognized on grounds of *expediency*. The rules which have been generally adopted by civilized communities prohibiting the killing of game at certain seasons of the year, come within the latter category. We prohibit the killing of partridges in breeding time, not because it is more immoral to kill them at that time, but because, if it is not prohibited, we shall have fewer partridges to kill next year. And so, it may be inexpedient to allow the killing of female seals in breeding time, because it will result in the extermination of the species; and, for that reason, it may be for the advantage of both nations that Great Britain and the United States should agree upon a close season in Behring Sea, during which the killing of seals should be prohibited; but it is not contrary to any recognized rule of morality to kill them at that time. It is only contrary to natural and reasonable economy. But, because a thing has been generally prohibited for economic reasons,

it does not follow that it is contrary to moral law, or opposed to any rule of international law.

It is true that the collection of rules for the conduct of civilized nations, in their relations with each other, which is called International Law, has grown up and developed out of the necessities of civilization and fundamental principles of morality; but they are rules which have been tacitly assented to, relied on, and applied by the great powers for generations, until they have become an unwritten international code, whose binding force is recognized. An example is to be found in the crime of piracy. Independent of any treaty, convention or express agreement of any kind, it is recognized by all the nations that each nation may seize and punish a pirate, no matter of what nation the pirate may claim to be a citizen. But, unless a specific act is a violation of some of the fundamental principles of morality, or has, in some way, been recognized by the great powers as an offence against the law of nations, no nation has the right to forcibly prevent the citizens of another nation from the commission of that act, or punish them for its commission, except within its own territorial jurisdiction. There the nation is, of course, supreme. The United States may prevent the killing of seals in breeding time within the three-mile limit, just as it may prevent the killing of buffalo in the United States; but, outside of the three-mile limit, it may not, unless the killing of animals *feræ naturæ* under such circumstances is contrary to some moral law recognized by Great Britain and the United States, or is a recognized offence against the unwritten code of international law, or unless the nations have expressly covenanted and agreed that this act shall be considered unlawful; and, even in the latter case, only such nations as have entered into the covenant or agreement are bound by its terms.

An illustration and example of international law established and binding only by convention or assent of the parties, may be found in the instances cited by Mr. BLAINE, of the assumption by Great Britain of jurisdiction of the

high seas beyond the three-mile limit. Mr. BLAINE pointed out, for instance, in his letter of December, 17, 1890, to Sir JULIAN PAUNCEFORTE, that, in 1816, while the first NAPOLEON was a captive on the island of St. Helena, Great Britain passed a statute forbidding the ships of any nationality to hover within eight leagues of the coast of that island. By the Treaty of Paris in 1815, the governments of Great Britain, Austria, Russia and Prussia had agreed that Great Britain should be the custodian of NAPOLEON. But assume that an attempt had been made by Great Britain to seize a ship of any other nation, not a party to the Treaty of Paris, as, for instance, a ship of the United States, for a violation of this hovering Act, it is reasonable to suppose that the British government would have at once disavowed the Act, and the ship would have been released, for the reason that the offence of hovering within eight leagues of the coast of St. Helena was not an offence against the recognized law of nations, but, at the utmost, was only a violation of the Treaty of Paris, which was binding only upon the parties who assented to it. It is reasonable to suppose this, because such was the principle applied by Lord STOWELL in the case of "*Le Louis*."¹ "*Le Louis*" was a French ship employed in the slave trade. She was seized by an English armed vessel off the coast of Africa. Lord STOWELL ordered her release upon the ground that the British Slave Trade Act could not affect the rights or interests of foreigners, unless it was founded upon the principles, and imposed regulations, that were consistent with the law of nations. He pointed out that trading in slaves, though generally recognized to be wicked, and though forbidden by the British Parliament, was not forbidden by the law of nations; nor had France, though disapproving of the slave trade, ever allowed that the offence of trading in slaves by French subjects should be cognizable by any authorities except their own. Lord STOWELL'S language is pertinent here.

"But," he said, "a nation is not justified in assuming

¹ 2 Dodson, 211.

rights that do not belong to her, merely because she intends to apply them to a laudable purpose; nor in setting out upon a minor crusade of converting other nations by Acts of unlawful force."

And so of the other illustrations, adduced by Mr. BLAINE, of jurisdiction outside the three-mile limit assumed by Act of the British Parliament. Grant, if you like—what is, however, not the case—that all such Acts were so worded as to be intended to affect the citizens of other nations than Great Britain, still they would be null and void as against such foreign nations, unless assented to by them or unless in conformity with the law of nations. The killing of seals in breeding time is not, any more than the slave trade was, an offence against the recognized law of nations, and no Act of Congress of the United States or claim of that government can make it an offence against the law of nations in so far as any other government is concerned, unless such other government acquiesce in that proposition. -

Hence it would seem that the Government of the United States has no right to protect the seals by prohibiting their killing outside the three-mile limit, unless there is some other claim of jurisdiction than that derived from the general principles of international law. And this brings us to the consideration of what jurisdictional rights the United States has in Behring Sea by treaty or assent of Russia or Great Britain. It is impossible within the space allowed for this article to do full justice to this branch of the subject. It involves a discussion of maps which cannot be reproduced here, but the main proposition contended for by the United States may be answered thus. By an imperial ukase of the Emperor Alexander, issued in 1821, Russia claimed exclusive jurisdiction of a marginal belt of Behring Sea, extending one hundred Italian miles from the shore. This claim was resisted by the United States.¹ The result was the Treaty of 1824 between the United States and Russia, by which it was provided that

¹ Letter from J. Q. Adams to Mr. Poletica, March 30, 1822.

the respective citizens and subjects of the United States and Russia "shall be neither disturbed nor restrained, either in navigation or fishing," in any part "of the great ocean commonly called the Pacific Ocean or South Sea." By a treaty between Russia and Great Britain, concluded in 1825, it was provided "that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein," etc.

It will be observed that both of these treaties were entered into with the view of determining the jurisdiction of Russia in the Behring Sea, and that they were entered into after both the United States and Great Britain had expostulated against the ukase before mentioned. Mr. BLAINE contends that neither the words "the great ocean commonly called the Pacific Ocean or the South Sea," in the Treaty with the United States, nor the words "the ocean commonly called the Pacific Ocean" in the Treaty with Great Britain, was intended to include the Behring Sea; and in his letter to Sir JULIAN PAUNCEFORTE, of December 17, 1890, Mr. BLAINE says:

"If Great Britain can maintain her position that the Behring Sea at the time of the treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well grounded complaint against her."

The reasons why it would seem that the Behring Sea, at the time of these treaties, was intended to be included in the Pacific Ocean is that, in the first place, the dispute to settle which the treaties were made, was in part, in relation to the jurisdiction claimed by Russia over Behring Sea; and, in the second place, because in his statement to Mr. MIDDLETON, in his letter of July 22, 1823, Mr. ADAMS uses the following clause:

"From the tenor of the ukase, the pretensions of the Imperial government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude on the Asiatic coast to the latitude of fifty-one degrees north on

the western coast of the American continent; and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of one hundred miles from the whole of that coast. The United States can admit no part of these claims."

And, as Lord SALISBURY expressed it in his letter to Sir JULIAN PAUNCEFORTE, of August 2, 1890, in order to infer that the United States did not intend to include Behring Sea in its denial of Russia's claim of jurisdiction, we would have to conclude "that, when Mr. ADAMS used these clear and forcible expressions, he did not mean what he seemed to say; that, when he stated that the United States could admit no part of these claims, he meant that they admitted all that part of them which related to the coast north of the Aleutian Islands."

By the fourth article of the Treaty between the United States and Russia, it was provided that "during a term of ten years, counting from the signature of the present convention, the ships of both powers on which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors and creeks upon the coast mentioned in the preceding article for the purpose of fishing and trading with the natives of the country." Thereafter, the term of ten years mentioned in Article 4 having expired, the question arose between the United States and Russia as to whether the expiration of that period of time did or did not affect the right granted by Article 1 of the treaty, to frequent the coasts of Behring Sea. This question was never settled, and Russia refused to comply with the request of the United States to renew Article 4 of the treaty.

Such were the rights of Russia and the United States respectively when Alaska was ceded to the United States in 1867. By the treaty of cession of 1867, all the rights and privileges which Russia had in Behring Sea passed to the United States; and if, as would appear to be the case, Russia never had a jurisdictional right extending to one hundred Italian miles of the coast of Behring Sea, the

United States certainly could not have got this jurisdictional right from Russia. And if the words, "the ocean, commonly called the Pacific Ocean" in the treaty of 1825 between Russia and Great Britain included Behring Sea, as Great Britain would rightly appear to claim that it did, the contention that Great Britain ever acquiesced in or conceded Russia's claim of jurisdiction to one hundred miles from the coast cannot be supported.

In conclusion, it may not be without interest to cite the position taken by the United States in 1875 in regard to jurisdiction over large seas and bays. In that year Mr. FISH, then Secretary of State, wrote to the Russian government as follows:

"There was reason to hope that the practice which formerly prevailed with powerful nations of regarding seas and bays usually of large extent near their coast, as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law which limits its maritime jurisdiction to a marine league from its coasts."¹

New York, October 20, 1892.

SUNDAY LAWS IN THE UNITED STATES.

BY JAMES T. RINGGOLD, ESQ.

THE constitutionality and the construction of "Sunday laws" have been considered by the courts of this country in nearly one thousand cases. So far as the mere weight of authority can settle anything, it is settled that such laws are valid under the Federal Constitution, and under the constitution of every State in which their validity has been contested.

¹ Wharton, Digest I, 106.

There are traces of a union of Church and State elsewhere in the body of American law (as in statutes against blasphemy, qualifications required of witnesses, etc.), but Sunday laws are by far the most conspicuous portion of this inheritance of ours from the English form of government.

To say that Sunday laws represent a union of Church and State, and that the weight of authority sustains such laws in the United States may sound to some like an impeachment of our judiciary, because the absolute separation of the two is commonly regarded as an axiom of American politics. Yet both propositions are demonstrable.

The second, of course, is established by a mere counting of the cases. The reading of them is enough to establish the first. Occasionally an objection is made to Sunday laws as interfering with the rights of property, etc. But in every case their constitutionality has been assailed, and in most cases it has been exclusively assailed on the ground that they are infringements of religious liberty. And not one of the judges who have sustained them on other than religious grounds has ever ventured the assertion that they are passed, or that their enforcement is asked for, on any other ground than these. And a statute which is passed or the enforcement of which is asked for on religious grounds represents a union of Church and State, *pro tanto*, no matter what other grounds the courts may allege for its enforcement.

It is difficult to formulate a general statement in American constitutional law, outside of the Federal system, because the language of the State constitutions differs widely, and the language of the statutes on any particular

[NOTE.—In a book entitled "Sunday: Legal Aspects of the First Day of the Week," by the present writer (Jersey City: Frederick D. Linn & Co.), an effort has been made to collect and classify all the cases of importance on the subject which have been decided in England and America to date (1891). In the following article, the intention is to cover the entire ground as thoroughly as may be, but it has not been deemed necessary to cite many cases which simply go to the same point. Under each branch of the discussion the aim is to present a typical case, the ruling or *dictum* of which fairly represents the average spirit of the cases of its class. So far as the writer knows, no argument has yet been presented in favor of Sunday laws which is not noticed here, and it has been his conscientious endeavor to give them all their best and strongest expression.]

subject is equally at variance. The force of this proposition is lessened, but it is by no means nullified by the interesting fact discovered and noted by Mr. STIMSON (see the Preface to his invaluable "American Statute Law") that there are in the Union "streams of legislation," that is to say, groups of States (of which he finds three, with some anomalies) whose legislation follows a uniform line, different from that followed by States of another group.

One of Mr. STIMSON'S "streams of legislation" is followed by twenty-nine States, whose constitutions declare in substance that no "preference" shall be given by law to one religious sect over another. If we admit that there is a like intent inspiring the somewhat diversified phraseology of the provisions for "religious equality," etc. in States outside of this stream—as we must admit, unless we are prepared to admit that a union of Church and State may be effected in such States—then we may frame this general statement regarding Sunday laws, as the result of the decisions to date: It is concluded that they would be invalid in any State, if they gave a "preference" to one religion over another, and it is denied that they give any such preference.

The constitutionality of a statute may be regarded from two standpoints—that of its design, and that of its effect. "Design" here must not be confounded with "motive." The legislature may be influenced by corrupt motives in the accomplishment of a design within its constitutional authority. Nothing is better settled than that upon this consideration the courts will never enter.¹ But suppose the legislature, by no means corruptly, but in all honesty and sincerity aims at the accomplishment of a design which it is forbidden by the Constitution to accomplish. And let us strengthen the case by assuming that if the statute passed with such an aim is sustained by the courts, the result will be the accomplishment of the unconstitutional design. Are the courts justified in sustaining the statute merely because some other

¹ *Ex parte McCordle*, 7 Wal., 506, 514; *Doyle v. Continental Ins. Co.*, 94 U. S., 535.

purpose is incidentally effected, at which the legislature might constitutionally have aimed?

Now religion concerns itself with two things, belief and conduct, and the distinction between one religion and another is two-fold—one requires a certain belief and certain conduct which the other forbids or does not require. Hence, it is not enough to say concerning the Sunday law: "what religion or religious creed or dogma is inculcated in that statute? Or what religion is prohibited? * * * Does it ask that any citizen shall believe in the God of the Bible or its teachings, or the doctrines of the Bible, the Koran or of Confucius, or the Talmud, or the Old or New Testament? Certainly not"¹—because, though no religious creed or dogma be inculcated, yet a "preference" may be given by a statute to one religion over another by the mere regulation of conduct. And this preference is given whenever conduct is regulated on religious grounds, according to the special prescription of any religious sect, or when the design of a statute is to punish an offence against religion *as such*. That Sunday laws do embody the prescription of a certain sect for the "observance" of that day is indisputable. Are they passed on religious grounds? Are they designed to punish offences against religion as such? Blackstone classifies them with the provisions against "apostasy," "heresy," "non-conformity," and the like, all of which things he calls "Offences against God and religion."²

This classification is followed in the "Codes" and Digests of Statutes of nearly every State and Territory in the Union. In dealing with the Sunday laws the courts uniformly allude to them as provisions against "profanation" or "desecration."³ But only a sacred thing can be profaned or desecrated; and whether a thing be sacred or not is altogether a matter of religion. So that to punish

¹ Sundstrom's Case, 25 Tex. App., 133. See also Specht's Case, 8 Pa. St., 325.

² Bk. IV., ch. 4.

³ "*e. g.*" Wood v. Brooklyn, 14 Barb., 425; Lindenmuller's Case, 33 Barb., 548; Nenendorff v. Duryea, 69 N. Y., 557; Nesbit's Case, 34 Pa., 86.

profanation or desecration is to punish an offence against religion *as such*.

That Sunday laws are passed on religious grounds is perfectly well known to every reasonable person. Mr. TIEDEMAN correctly says "The most common form of legal interference *in matters of religion* is that which requires the observance of Sunday as a *holy day*. In these days the legal requirements do not usually extend beyond the compulsory cessation of labor, the maintenance of quiet upon the streets and the closing of all places of amusements; *but the public spirit which calls for the compulsory observance of these regulations is the same which in the colonial days of New England imposed a fine for an unexcused absence from Divine worship*. Although other reasons have been assigned for the State regulation of the observance of Sunday in order to escape the constitutional objections that can be raised against it if it takes the form of a religious institution, those who are most active in securing the enforcement of the Sunday laws *do so because of the religious character of the day*, and not for any economical reason. . . . The effectiveness of the laws is measured by the influence of the *Christian idea of Sunday as a religious institution*."¹ So says Judge COOLEY "It is clear that these laws are supportable on authority *notwithstanding the inconvenience which they occasion to those whose religious sentiments do not recognize the sacred character of the first day of the week*."² And what is this but saying, and saying with perfect correctness that Sunday laws simply embody the views of those who *do* recognize the "sacred" character of the first day of the week, and are therefore passed on religious grounds alone? "The Jew" says Judge COOLEY in a previous paragraph "may *plausibly* urge that the law *discriminates against his religion*, and, by forcing him to keep a second Sabbath in each week unjustly, though by indiscretion, *punishes him for his belief*." Why "*plausibly*?"

¹ Limitations of Police Power, pp. 175-6, see 76. The italics are those of the present writer, here and in other citations.

² Constitutional Limitations, p. 385, ch. xiii (Ed. 1890),

Is not the discrimination perfectly plain? May it not be conclusively urged?

But the fact is clear enough without authority that Sunday laws embody a religious dogma, and that they constrain the citizen on religious grounds alone. There are two sides, again, to this religious character of Sunday laws—the side of the constrainer and the side of the constrained. So far as the latter is concerned, the real spirit of such legislation has been frankly stated by a North Carolina Judge who says that work on Sunday “offends us not so much because it disturbs us in practicing for ourselves the religious duties or enjoying the salutary repose or recreation of that day as *that it is in itself a breach of God’s law and a violation of the party’s own religious duty.*”¹ A plainer truth, one more clearly and fully appreciated by Sunday law advocates, while they seek to ignore and even deny it, was never printed. So far, then, as the constrained are concerned, the object of Sunday laws is to compel them to perform a religious duty, and to punish an offence against religion *as such*. And as this religious duty is exacted by some religious communions and not by all, the “preference” among religions is established.

In strict accordance with this view are the New Hampshire decisions on the point of what constitutes a “disturbance” of one person by another on Sunday. At first sight it might seem unobjectionable to provide that no work should be done on Sunday “to the disturbance of others,” as is done in New Hampshire. But the value of the qualification, if it had any, is destroyed by the judicial construction. The Court has taken the North Carolina view that the statute was intended to prevent “acts calculated to *turn the attention of those present from their appropriate religious duties to matters of more worldly concern,*”² and hence it is settled in that State that business, however quietly conducted on Sunday, “disturbs” those engaged in it, and that a man is “disturbed,” though he be willing

¹ William’s Case, 4 Sec. 400.

² George v. George, 47 N. H., 27.

and even anxious to do business on Sunday, by the doing of it, or by any act, however voluntary, which *tends to distract him from religious observances.*"¹

There is no mitigation, then, of Sunday law rigor in the use of the proviso about disturbance. Nor is the New Hampshire Court to be reproached for pandering to the spirit of Puritanism in construing its law, proviso and all, as intended to apply to individual conduct, without any reference whatever to its actual effect on others. How the words "to the disturbance of others" came to be inserted in the New Hampshire statute it may not be practicable to ascertain; but there can be no doubt that they would have been promptly stricken out if it had been suggested to the framers of that statute that such words might be taken to mean that a man might do as he pleased on Sunday, if he only did it quietly. There is no doubt that the Court, as in duty bound, gave effect to the legislative intent in its view of the objects of the Sunday law.

There are other considerations which may be noted here in connection with the subject of "disturbance." Even if the New Hampshire Court were wrong, and the word was meant to apply to others than the doer of the act in question, there would be no saving efficacy in the phrase. We are at once confronted with the difficulty—who is to determine whether or not one man is disturbed on Sunday by the act of another? If the first man's assertion is to be taken as conclusive on the subject, of course there is no use in having such words in the statute. But when we admit that the question of disturbance *vel non* is one for judicial determination in any given case, we see at once that this qualification involves a fatal confession of the nature and purpose of all Sunday laws. For, without any statutes, wherever the common law, or any other logical system of jurisprudence prevails, that is, among any civilized people, work which "disturbs" others is unlawful at all times. To "disturb," in the eye of the law, is to in-

¹ See *Varney v. French*, 19 N. H., 223; *Thompson v. Williams*, 58 Id., 248.

fringe on some right or privilege which it creates or recognizes. When, therefore, the law recognizes a privilege as existing on Sunday which exists on no other day, and considers that acts will amount to a "disturbance" of others on Sunday which will not amount to such disturbance on any other day, we must ask ourselves what this special privilege of Sunday is, which is thus honored. It cannot be the right "peaceably to assemble." In every American constitution this right is guaranteed expressly or impliedly, and it exists at all times. Nor does it matter what the purpose of assembling may be, unless it be tainted with treason. People may assemble at any hour of the day or night, and talk religion or infidelity, or politics or dress reform, and if anybody disturbs their assembly, the police will lock him up. The right of assembly and the question of what constitutes a disturbance of or an infringement of that right does not in the smallest degree depend on the object of the assembly, as religious or otherwise, nor does it depend in the smallest degree on the time of the assembly, as on Sunday or Monday. The standard of the law, its test of the right and its violation is the same for all assemblies and all periods. What special "right" is it, then, which is disturbed on Sunday by certain acts which disturb no rights on any other day? Let a Pennsylvania Court answer for us: "There are other rights intimately associated with rights of conscience which are worth preserving. *The right to rear a family with a becoming regard for the institutions of Christianity, and without compelling them to witness hourly infractions of one of its fundamental laws*"¹—that is to say, Sunday statutes are passed to compel one man to observe a "fundamental law" of Christianity for the benefit of another man's children. But a statute passed for the purpose of enforcing a law, fundamental or otherwise, of any particular religion gives a "preference" to that religion, unless an equal privilege be accorded to a like law of every other religion.

These authorities are adduced not in order to establish

¹ Johnston's Case, 22 Pa., 102.

the proposition that Sunday laws embody a preference of one religion over another, but merely, as is proper in an article written for a law magazine, to show that this fact has, at least in some cases, been frankly recognized by the courts. It would be equally a fact if all the courts in the country denied it. All the decisions of all the courts cannot make black white. The decision of a court may settle whether or not a Sunday law is enforceable, but it can have no effect upon the question of the origin, or the inspiring motive of such legislation. So the more numerous decisions (more numerous especially among the later cases) which take what is known as the "secular view" of Sunday laws are of no account whatever as evidence of the correctness of that view, because this is a question not of law at all, but of historic fact.

It has been said that the law will prevent the disturbance of a meeting without regard to its character as religious or otherwise. Like many other things in law, this disregard results from its refusal to attempt impossibilities. The law has no test whereby to determine whether a meeting is religious or not. This being claimed as the character of a spiritualist camp-meeting in a Sunday law case, the Court left the point to the jury.¹ The "unseemliness" of controversies over such a point, the impossibility of settling any rule for deciding them, the purely religious nature of the dispute are self evident. It is a mere evasion to leave such a question to a jury. An American jury has no authority to decide any question of which American law can take no cognizance. Neither jury nor judge can decide in this country the right and title of any system of belief to be called religious. It is a usurpation for a jury to render a verdict on such a question. It is quite as much a usurpation for a judge to render and enforce a judgment on such a verdict by a jury of others as it would be for him to do so after sitting as a jury himself.

But even were it practicable for American law to discriminate between a religious assembly and any other in

¹ *Feital v. Middlesex R.R.*, 109 Mass., 398.

the protection afforded against disturbance, no reason whatever exists for attempting such a discrimination. The simple fact is—though, like many other facts, it is constantly “blinked” in the discussion of this subject—that a religious assembly is disturbed by just precisely the same acts which would disturb any other assembly, and by no other acts whatever. From this point of view all sorts and conditions of men are alike. The orderly and regular conduct of a caucus and a church service, the ability of those present to keep abreast of what is going on, and to influence others—these things require precisely the same police conditions in the one case as in the other. This, again, is not matter of law, but fact. The Seventh Day Adventists, that remarkable people whose headquarters are at Battle Creek in Michigan, lately protested before Congress through their clear-headed and eloquent representative, Mr. ALONZO T. JONES, against the attempt of the Women’s Christian Temperance Union to have a Federal Sunday law enacted. Mr. JONES consistently—he and his people are nothing if not consistent to the core—disclaimed any desire to have his “seventh day” substituted for Sunday, declaring, with perfect correctness, that all such legislation involved that union of Church and State which his organization is pledged to oppose with unrelenting hostility. But he also laid special stress on the fact that his brethren were not disturbed in any manner whatever in their “seventh day” observances by other people’s pursuit of their regular occupations—and therefore they did not need the law, even if they felt it right to ask its aid, in order to enable them to observe their day according to their wish. We have among us Jews and Seventh Day Baptists, and their experience is the same—that no “Sunday law” is needed to protect them in the full enjoyment of their Scriptural Sabbath. We have also Roman Catholics and Episcopalians who observe such fasts and feasts as Lent, Christmas, Good Friday, “saints days,” etc., by holding religious assemblies. Not one of them has ever complained that these assemblies are in any wise disturbed by the steady course of the world’s daily

work and traffic. The case is still stronger when we come to those who are specially interested in Sunday laws, to whose agency such laws and their spasmodic enforcement are due. These may be broadly grouped as "Evangelicals." Such persons make a regular practice of holding "prayer-meetings" on week-days. The claim has never been advanced that these assemblies are disturbed by the ordinary labor of those who fail to attend them. So, also, with the great "revivals" to which some of them are addicted. Day after day, every day and night in the week, they assemble-for religious purposes on such occasions. It has never been remarked that the week-day services are disturbed any more than those held on Sunday—that they are any less satisfactory to those who conduct them, or less profitable in the ratio of "conversions" to attendance.

So that we see our proposition that nothing can disturb a religious meeting which does not disturb any other kind of meeting proven by daily experience of the life around us. And we see further that, as the disturbance of religious meetings at any time will be prevented by the "police-power" of the State, no "Sunday law" is needed to prevent such disturbance. And we are thus brought face to face with the truth of the matter—namely, that the only disturbance involved in Sunday work is the disturbance of one man's right to constrain another to a certain line of conduct as a religious duty; and that Sunday laws are therefore passed with a religious purpose, and designed to punish offences against religion *as such*, and so constitute a "preference" by the state of one religion over another.

As this true character of Sunday laws becomes more and more evident to the American people, the demand for their repeal grows stronger and stronger. Nor is this demand to be thwarted by quibbling over what constitutes a union of Church and State. Like other unions, this may be complete or partial. The only instance in history of a complete union of the two, or an absolute identity of Church and State was the polity of the Hebrews in Pales-

tine.¹ But in every civilized country the union exists to a greater or less extent. It was to guard against it that all such provisions as those forbidding a preference among religions have been inserted in the American Constitutions. It exists in the very teeth of such provisions wherever a Sunday law is found.

The advocates of these laws appreciate their danger, and hence we see in some later cases an invention known as "the holiday theory" of Sunday laws brought to the rescue of a failing cause. Said an Arkansas judge: "The power of the legislature to select a day as a holiday is everywhere conceded. The State from the beginning has appropriated Sunday as such."² And he added that the same principle which upholds the right of the State to close its offices on certain days authorizes it "to prescribe a penalty for the violation of the Sunday law." The extract *ante* from Mr. TIEDEMAN sufficiently refutes this parallel so far as it affects the question of the origin and purpose of Sunday laws. Its fallacy is equally apparent from their contents. Whoever heard of such a thing as a compulsory holiday? Whoever heard of a statute which established a public holiday and closed all places of public amusement, and provided a penalty for those who should undertake to amuse themselves in private upon the day in question? Desperately as some are clinging to this last spar, it must share the fate of the other wrecked arguments by which it is sought to support Sunday laws on constitutional grounds.

There are cases, however, which take "a secular view" of such legislation without going so far as to claim that it makes a holiday of Sunday. According to these "the evident object of the statute was to prevent the day from being employed in servile work, which is exhausting to the body, or in merely idle pastime, subversive of that order, thrift and economy which is necessary to the preservation of society."³

¹ See Milman's History of the Jews.

² Scale's Case, 47 Ark., 476.

³ Landers v. R. R., 12 Abb. Pa. (N. S.), 338.

Let us consider these clauses separately. Has it ever been claimed that it is within the power of an American legislature to compel a man to abstain from earning his living by "servile labor," because the legislature in its wisdom, considers such labor as "exhausting to the body"—ever claimed, that is, except in connection with Sunday laws? Who made of the legislature a physician to order off a man from any labor, "servile" or otherwise, because of its effect upon his body? Is not the liberty of labor at will part of the inheritance of every citizen of a free country which he "comes into" when he attains his majority? The interference with labor on account of its "exhausting the body" is parental, and can never be justified under any other than a parental government. So that if this interference were necessary or even desirable, it would not be practicable in any State whose constitution contains a guaranty of personal liberty. As a matter of fact, however, it is neither necessary nor desirable, though many of the cases assume that it is both, and Sunday law advocates of every kind are prone to start with the statement, as if it were an axiom of thought that "we are so constituted physically that the precise portion of time indicated by the Decalogue must be observed as a day of rest and relaxation, and nature, in the punishment inflicted for a violation of our physical laws adds her sanction to the positive law promulgated at Sinai."¹ Yet this statement, so often made in substance on the Bench and elsewhere in order to justify Sunday laws, is absolutely without any foundation whatever, and is absurd on its face and is contradicted by the most familiar facts. It is absurd on its face. The amount of rest required and the advisable periodicity of it is the result of three factors—the man, his work, and his environment; and, as the first of these is never the same in any two instances the result is never the same. To attempt to lay down a uniform rule on this subject is as preposterous as it would be to require everybody to eat the same amount and the same kind of food every day. What is said above about the punishments

¹ *Lindenmaller's Case*, 33 Barb., 548.

of "nature" applies here as it was not intended to apply. The whole matter belongs to her domain and is subject to *her* laws alone. The time for rest is proclaimed by her when she makes a man tired, and his punishment may safely be left in her hands, if he disobeys her mandate to rest.

Of course there are no facts adducible which even appear to sustain so monstrous a proposition as that everybody always needs the same amount of rest at the same interval. The facts are all the other way. Preachers who work hard all the time, and do double work on Sundays; doctors who can never rest at any stated interval; lawyers, journalists and others, who frequently work day in and day out for months without a holiday—all these compare favorably for robustness and longevity with that conscientious Sunday refter, the farmer. Races of men, as the Greeks and Romans of old, the Chinese, Japanese, etc., to whom the idea of resting at stated intervals never occurred, yet have survived and flourished. Not long ago the Methodist Bishop, ANDREWS, gave it out as "something he could not understand" that they had no Sabbath in China, and yet the laboring men lived to old age! Of course the good Bishop shut his eyes at home, and opened them in China. He was under that delusion so common with men of his calling that the existence of a law is proof of its enforcement. He did not know or chose to ignore the fact that thousands of his fellow-Americans who know no Sabbath are as healthy, long lived and at least as active in the world's work as the strictest Sabbatarian in his communion.

Besides negating the arguments by which Sunday laws have been defended, and calling attention to the positive objection to them as the embodiment of a union of Church and State, it may be well to point out another undesirable characteristic of such legislation. Although Sunday laws do not make the day a holiday, yet they have this in common with laws establishing holidays—that they tend to encourage among the people the conception that idleness is a good thing in itself, to be sought for its own sake,

and that the State is conferring a great boon upon them by allowing them the opportunity of indulging in it. No more immoral or dangerous doctrine could be preached by any legislation than this. Rest is necessary; but its value lies not in itself; it is valuable only in so far as it fits us better for our work. Public holidays may have a historical value; that their general effect on the manners of the mass is demoralizing few will deny. Leisure is a dangerous possession in the hands of the wisest and best. Let the managers of factories, the heads of schools and the like be heard to testify to the slipshod character of "Blue Monday's" work, and we shall appreciate the profundity of that unknown philosopher who gave it as his decided conviction that the crying need of this country is not more holidays, but more days to get over them.

Industry is a virtue; idleness is a vice. But our Sunday laws make a complete topsy-turvification of this fundamental principle of morals for fifty-two days in the year. On these days, industry is branded as a crime, and idleness is required as a condition of good citizenship. The immoral lesson thus taught bears its fruit in the constant demand for more public holidays, and for limiting the hours of work by the State and other laws which are strangely misnamed as "labor legislation," being in reality, like the Sunday laws, legislation for the promotion of idleness. And thus we have another illustration of the great principle, and the evil tree of Sunday law brings forth after its kind.

The survey of the subject would not be complete without some reference to the savings of "necessity," and "charity," which are made in all Sunday laws.

The very presence of the word "charity" is sufficient to betray the true nature of these laws as religious dogmas enacted into statutes. The interpretation of the word has, of course, to be made accordingly. And hence it is correctly said that "*the means which long established and common usage of religious congregations show to be reasonably necessary to advance the cause of religion may be deemed works of charity.*"¹ But, apart from its fatal disclosure of

¹ Dale v. Knapp, 98 Pa., 389.

the religious character of the statute, the presence of this word, like that of "necessity," introduces a degree of uncertainty as to the application of the law which it is safe to say would cause the courts to hold it void altogether if it were anything else but a Sunday law. Well has a learned judge of Vermont observed, "The statute excepts all acts of necessity and charity. These are lawful, and who is to judge what are such? If the jury, it will depend on the religious opinions of each jury, and of course be pregnant with the utmost uncertainty. If the Court, as matter of law, then *it will nearly convert a bench of laymen into an ecclesiastical council, for 'necessity' and charity in connection with the Sabbath must very much depend upon the creed or religious belief of the individual to whom the question is submitted.* * * * *How ungracious for a court to mark the law upon this duty for all denominations to be governed by and with judges usually belonging to different religious societies. It would be like a synod composed of the dignitaries of several sects.*"¹ The uncertainty involved in the use of the word "charity," apart from the religious aspect of the question, may be illustrated by the preceding case.² This held that a contract of subscription towards the erection of a church was valid as an act of charity. If so, on what ground is the actual building of the church on Sunday unlawful? Or the quarrying of the stone for its walls, or the dressing of timber for its interior? In a word, where are we to stop in the degree of closeness of connection between the act in question and 'the advancement of the cause of religion?' It does not seem possible that the subtlest judicial ingenuity will succeed any better in the future than it has in the past, in affording a satisfactory answer to this question.

But if an impenetrable cloud is cast over the force and application of the Sunday law by the presence of this word "charity," on what a bottomless, trackless sea are we launched by the use of that other word "necessity!" The

¹ Lyon v. Strong, 6 Vt., 236.

² Dale v. Knapp, *supra*.

tossings and flounderings, the hopeless "seeking after a sign," the vain beating toward a harbor which does not exist which we find in the cases on this subject are really painful to a sensitive mind. Among others, the eminent Judge and Senator THURMAN, of Ohio, once wrestled with this subject in a long opinion.¹ But the outcome of it all is that there is no way of defining "necessity," though the learned judge does not say this in so many words. In the first place, we do not know whether necessity is a question of law or of fact, or of both combined.² And secondly, it is unsettled whether the necessity must be that of the doer of the act or whether it is sufficient if his doing of it was a necessity to somebody else.³

It is, however, when we leave these preliminary questions and come to consider the nature of this necessity of which we are to determine the existence or non-existence in any given case—when we study the *thing in itself*, as some philosophers say, that we most fully appreciate the hopelessness of interpreting or applying a Sunday law with any degree of uniformity or fairness. Only a few points need be mentioned to vindicate this position. We are told that the necessity need not be "absolute,"⁴ yet it must be "imperious,"⁵ and mere "convenience" is not enough;⁶ that it varies with the individual, so that a rich man might be punishable for working on Sunday to save his property from destruction, while a poor man would not be,⁷ and also with "the exigencies of trade,"⁸ and so

¹ See *McGutrick v. Mason*, 4 O., 566.

² It is one of fact in *Indiana*, *Edgerton's Case*, 68 Ind., 588; of law in *Vermont*, *Lyon v. Strong*, 1 Vt., 219; and of law and fact in *Alabama*, *Hooper v. Edwards*, 25 Ala., 528.

³ In England, a barber is not excused by the fact that his Sunday shaving was a necessity for his customer. *Phillips v. Tuness*, 4 Cl. & F., 234. But it is said that here the apothecary is justified in selling a medicine which is a necessity to the sick. *L. & N. R. R.'s Case*, 89 Ind., 291.

⁴ *Flagg v. Millbury*, 4 Cush., 243.

⁵ *Ohmer's case*, 34 Mo. App., 115.

⁶ *Allen v. Duffie*, 43 Mich., 1.

⁷ See *Whitcomb v. Gilman*, 35 Vt., 297.

⁸ *McGutrick v. Mason*, 4 O., 566.

on and so forth. Here, as under all of our preceding heads, the illustrations might be multiplied indefinitely without materially strengthening the moral, which is that a "chaos of thought and passion all confused" has inspired the enactment of Sunday laws, stimulates their enforcement, and manifests itself in every judicial attempt to either justify, explain or apply them.

Baltimore, Md., October 20, 1892.

ANNOTATIONS.

DEPARTMENT OF EQUITY.

EDITOR-IN-CHIEF,

R. C. MCMURTRIE, LL.D.,

Assisted by

SYDNEY G. FISHER,

HOWARD W. PAGE,

JOHN DOUGLASS BROWN, JR.,

ROBERT P. BRADFORD.

MULLEN, TRUSTEE OF SIMPSON *v.* DOYLE AND GREEN,
APPELLANTS.¹ SUPREME COURT OF PENNSYLVANIA.

Constructive Trusts—Trustee Purchasing Trust Property at Sheriff's Sale—Withholding Information from cestui que trust.

When property of a *cestui que trust* is taken from the control of the trustee and sold at sheriff's sale, the trustee is not incapacitated by his fiduciary position to become the purchaser. But the sheriff's seizure does not release the trustee from his character, and his right to purchase depends on the discharge of his full duty as trustee, which includes the communication of any information which may possibly be utilized by the *cestui que trust*.

On appeal from a decree for plaintiff upon a bill filed to have a certain piece of real estate declared to belong to a trust estate.

From the findings of the master the following facts appeared:

STATEMENT OF THE CASE.

In 1874, R. F. Simpson and wife, by deed duly executed, constituted Patrick Doyle trustee of certain real

¹ Reported in Ad. Reps. Leg. Int. Supplement, Vol. XLIX, p. 38, March 14, 1892.

estate, including the property in question. In 1879, the mortgagee, who held a mortgage of \$40,000 against it, foreclosed and sold the property. Just before the sale, which was entirely hostile to and beyond the control of the trustee Doyle, the trustee went to counsel of the mortgagee and asked for time. Counsel replied that the mortgagee did not wish to own the property, that if somebody would come forward within a very limited time and pay up all that was necessary (including counsel fee) to cut down the incumbrance to the principal of the mortgage (\$40,000), the mortgagee, counsel felt sure, would be glad to have such person take the property off their hands. There was no agreement of any sort other than this. The mortgagee bought in the property, and afterward Doyle, the trustee, raised sufficient money to pay the mortgagee all the money due down to the \$40,000 mortgage, and took title from the mortgagee's agent in the name of one John I. Green, who gave a purchase money mortgage for \$40,000. A declaration of trust by Green in favor of Simpson had been drawn, but did not appear to have been executed. There was an executed declaration of trust by Green in favor of Doyle. Simpson knew nothing of this until after suit, nor did he know of the negotiation between the trustee Doyle and the counsel for the mortgagee. He believed, however, that Green held the title, and that the property would come back to himself after the debts were paid. This was what his counsel, O'Bryne, had told him in Doyle's presence.

The bill, filed in 1885, alleged *inter alia*, (8) that the sale of 1879 had been procured by Doyle upon an express agreement to purchase the property with funds of the trust estate, or upon the security of the title, and to reconvey to the trust estate as soon as the advances were repaid. There was also the further allegation (9) that Doyle was under a legal incapacity to deal with the title to be produced at the sheriff's sale, because he was the actual trustee of the title divested by the sale.

A final account, filed by Doyle in March, 1885, was the first notice to Simpson that the title was held adversely to the trust.

The master recommended a decree of conveyance by Green, and charged Doyle with rent since the sheriff's sale, and refused to allow credits for commissions paid for collecting rent. Exceptions were filed by appellants, which were dismissed, and a decree entered by the Court.¹

The assignments of error specified, that the Court erred (1) in holding that the failure to communicate to the *cestui que trust* the statement of mortgagee's counsel, recited above, rendered the purchase invalid; (7) in decreeing a conveyance; (8) in charging Doyle with rents received since the sheriff's sale, and refusing to allow him credit for commissions paid real estate agent for collecting rents; and (9) in not dismissing the bill.

Frank P. Prichard and Samuel Gustine Thompson, for appellants. *Robert H. Neilson and Geo. Tucker Bispham*, for appellee.

ABSTRACTS FROM OPINION.

MITCHELL, J. Though there was no express agreement to purchase for the trust, there is evidence satisfactory to the master and the Court below that Simpson believed such was to be the case, and that the conduct of Doyle aided in producing that belief. The master finds expressly that Simpson was told by O'Byrne in Doyle's presence that Green would take the title as trustee, that a declaration of trust by Green in favor of Simpson's wife and family was prepared by counsel, and Simpson supposed it was executed, that the declaration of trust for Doyle was not put on record, that Simpson did not know of it until it was produced before the examiner in this suit, and that the first adverse act of Doyle to put Simpson upon notice and inquiry was the failure to include the rents of the property in the account filed in 1885. But aside from, and in addition to all this, the undisputed fact is, that Doyle did not communicate to his *cestui que trust* the terms upon which the property could be regained after the sale. While it is clear that no agreement was made by the counsel for the mortgagee, it is equally clear that he expressed a belief as

¹ See opinion of Pennypacker, J., 47 Leg. Int., 48.

to his client's willingness to make certain terms which proved to be correct, and was subsequently carried out by his client. This option, prospect, opportunity, whatever it may be called, however far short of an agreement, was still an advantage to which the *cestui que trust* was entitled. It practically gave the party who knew of it a chance to become the purchaser on a credit of forty thousand dollars to be left in mortgage on the property, and on a cash outlay of only eight or nine thousand, while outside bidders were, so far as they knew, required to purchase for cash in full. Of this chance Doyle took advantage. It may be that even with knowledge of it Simpson could not have profited by it. But, according to the master's report, there was still some other trust property which might possibly have been sold or mortgaged for enough to save this, or in other ways he might have raised the money necessary. Whether he could or not is unimportant, he was entitled to an opportunity to try. The withholding of such opportunity was a failure of his full duty as trustee, that, irrespective of intent and of any actual fraud, prevented Doyle from acquiring the title for himself as against his *cestui que trust*.

Decree affirmed at cost of appellants.

PURCHASES BY TRUSTEES AT SALES UNDER ADVERSE PROCEEDINGS.

The well-known Rumford Market case (1726) enunciated a principle adopted by courts of equity for the purpose of eliminating from the fiduciary relation the element of selfishness, and, therefore, the object of strong and bitter assault. Briefly stated, it is that a trustee or other fiduciary shall enter into no transaction affecting the subject matter of the trust whereby he may be personally benefited. The observance of this principle is secured by means of the doctrine of constructive trusts, whereby the estate of the *cestui que trust* derives all the advantage (Robbins v. Butler,

24 Ill., 432; Herrick v. Miller, 123 Ind., 304; Denholm v. McKay, 148 Mass., 434; Heager's Ex'rs (Pa.) 15 S. & R., 16; Green v. Sargent, 23 Vt., 466). The cases in which its application has been invoked may so far as purchasing the property is concerned, and for convenience of treatment, be grouped under three heads.

(1) Where the trustee purchases the property which forms the subject of the trust directly from his *cestui que trust*.

(2) Where the trustee purchases at a sale made in the interests of the estate, either by himself in vir-

tue of a power to do so or by order of a court of equity and under its supervision.

(3) Where the trustee purchases at a sale made in the interests and under the control of those who are seeking the satisfaction of their claims, which may be called a sale under adversary proceedings.

In all of the above cases equity protects the interests of the *cestui que trustent* by considering that the trustee has acted for the benefit of the estate.

(a) Of the first class it is only necessary to say a word, since the rule laid down in the leading case of *Fox v. Mackreth*, (4 Bro. P. C., 258; 1 Lead. Cas. Eq., 115) decided in 1788, has since been invariably followed: a trustee cannot purchase from his *cestui que trust* unless it satisfactorily appears to the Court that the connection between them has been dissolved and that all knowledge of the value of the property acquired by the trustee has been communicated to his vendor. In *Cowee v. Cornell*, a case wherein undue influence was charged, the Court, after stating that fraud was not generally to be presumed, delivered this very comprehensive statement of the rule under consideration: "Wherever the relation between the contracting parties appears to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side, from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or on the other, from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the transaction is presumed void and it is incumbent upon the

stronger party to show affirmatively that all was open, fair and well understood" (75 N. Y., 91; see also *Brown v. Cowell*, 116 Mass., 461; *McClure v. Lewis*, 72 Mo., 315; *Waldrop v. Leaman*, 30 S. C., 428; *Wright v. Campbell*, 27 Ark., 637).

In this class of cases it will be observed that equity deals with the transaction on the theory of constructive fraud rather than of constructive trusts and the validity of the purchase rests on the ability of the trustee to rebut the presumption thus cast upon it.

(b) Cases in the second class are governed by a different rule.

"A trustee purchasing the trust property is liable to have the purchase set aside if within a reasonable time the *cestui que trust* chooses to say he is dissatisfied with it" (*Campbell v. Walker*, 5 Ves., 678, 680). Both of these rules seek to protect the interests of the *cestui que trust* and the difference grows out of the fact that in the second class of cases the consent of the *cestui que trust* to the transaction has been neither sought nor given. Where they contract together the *cestui que trust* of course consents, and the Chancellor can only insist that the reality of that consent be established. Where, however, the trustee acts without even the knowledge of the *cestui que trust* the latter, when he discovers the purchaser, is in the position of being approached for his consent and he is then at liberty to actively dissent and thus invalidate the whole transaction.

In some of the early cases reliance was placed by counsel on a qualification of the old Roman rule *tutor rem pupilli emere non potest*, to the effect that the validity of his purchase at public auction could

not be questioned provided the trustee brought *palam et bona fide* and not *per interpositam personam*. But Lord ELDON demonstrated that the manner of the purchase was of no importance, nor was even the question of profit an element for consideration, since the object of the rule was to prevent fraud which might be perpetrated and which could so easily be concealed. It is certain that the position of the trustee gives him a coign of vantage. He has full opportunity, indeed it is his business to acquire a complete knowledge of the value and circumstances of the property which he administers for another. He might in a given case resist the temptation to use this for his own benefit; but to secure the *cestui que trust* the rule must needs admit of no relaxation. "If the trustee can buy in an honest case he may in a case having that appearance, but which from the infirmity of human testimony may be grossly otherwise" (*Ex parte Bennett*, 10 Ves., 385). The Court, therefore, very wisely refrains from any inquiry into the transaction itself.

In this country the general rule has received almost universal approval and sanction.

Of purchases made by the trustee at his own sale the leading case of *Davoue v. Fanning* is a good example. An executor with power to sell for the payment of legacies exposed the property of his testator for sale at public auction, and by previous arrangement it was purchased for his wife, who was also beneficially interested in the proceeds. The sale was *bona fide* and for a fair price, but upon a bill filed by another beneficiary under the will Chancellor KENT ordered

a resale of the property on the ground that as the executor's interest interfered with his duty the case fell within the rule, that if a trustee acting for others sells an estate and becomes himself interested in the purchase the *cestui que trust* is entitled as a matter of course to have that purchase set aside (*Johns. Ch.*, 252; see also *Dyer v. Shurtleff*, 112 Mass., 165; *Lewis v. Welch*, 47 Minn., 193; *Chandler v. Moulton*, 33 Vt., 245; *McNeil v. Gates*, 41 Ark., 264; *Roberts v. Roberts*, 65 N. C., 27; *Jamison v. Glasscock*, 29 Mo., 191).

Purchases at a public sale, judicially ordered and conducted, are governed by the same rule. An executor, in Louisiana, purchased the property of his testator at a public sale, ordered by a judge of a Probate Court upon his petition. He attempted to sustain the validity of his purchase on the ground that the sale was under the supervision of a court of equity, and there could be no opportunity to commit a fraud. The Court was of opinion that any inquiry into the facts of the case, with a view to establish the trustee's honesty, was unnecessary, since the executor was clearly within the rule which was framed to dispense with just such an investigation (*Michoud v. Girod*, 4 How., 503; *James v. James*, 55 Ala., 525; *Caldwell v. Caldwell*, 45 Ohio, 512; *Mercer v. Newsom*, 23 Ga.; *Hoit v. Webb*, 36 N. H., 158).

Nor is a trustee allowed to purchase for others. The rule aims to prevent him from using to the prejudice of the *cestui que trust*, any information which it is his duty to acquire, and it is too delicate to hold that he will not be tempted to so use it if allowed to bid for an-

other. (The distinction is too thin to form a safe rule of justice, per Lord Eldon in *Ex parte Bennet*, 10 Ves., 385; also *Platt v. Longworth*, 27 Ohio, 159; *Davoue v. Fanning*, 2 Johns, Ch., 252.)

Tennessee, however, while sanctioning the application of the rule to trustees, purchasing at their own sales, has made an exception of the case of a purchase at a sale judicially ordered and conducted. The question arose in a case wherein a subsequent purchaser, from a guardian who had purchased the property of his wards at a sale ordered and conducted by a court of equity, upon an application for a partition resisted the enforcement of his contract on the ground that the guardian's title was invalid. The Court, however, laid down the rule which has never been deviated from that the guardian may purchase the property of his ward sold under an order of a court of competent jurisdiction for his benefit, and, if it be manifest that he has acted fairly with the utmost good faith and the transaction is free from any imputation of a design on his part to gain a benefit to himself to the prejudice of the interest of his ward, such a purchase is valid (*Blackmore v. Shelby*, 8 Hump., 439). As will be noticed, the objection here did not come from the *cestui que* trust, and the Court, in its remarks, exceeded the necessities of the case. But the exception has become established (*Ex parte Crump*, 16 Lea, 732).

The case of a guardian purchasing at a judicial sale for the benefit of the ward, is clearly within the spirit of the maxim, *emptor emit quam minimo potest venditor vendit quam maximo potest*, which does not suffer any person to purchase

property for himself who is at all interested on behalf of others in preventing a depreciation of the amount for which it may be sold. And to rest the disqualification of the guardian as a purchaser solely on the evil influence which he may exert over the conduct of the sale is merely *harere in cortice*. See also *Downs v. Rickards*, 4 Del. Ch., 416.

In Texas and Missouri executors and administrators are forbidden by Statute to purchase the estate of their decedents; but in South Carolina, after much fluctuation in the courts, the right to purchase, at any sale, was given them by an Act of 1839, 11 Stat., 94, the provisions of which are incorporated in section 1974, Gen. Stat. The evil is obviated somewhat by charging them with the full value of the property without reference to the amount bid at the sale (*Huger v. Huger*, 9 Rich. Eq., 217).

The exceptions so far noted are partial, but there remains to be considered an exception, which embraces all classes of fiduciaries, and which prevails in three States—Alabama, South Carolina and Texas. A trustee, who is at the same time beneficially interested in the property which forms the subject matter of the trust, can purchase it at public sale, and his title will be sustained. The only effect of the fiduciary relation is seen in the jealous care with which the Court examines all the proceedings relative to the sale not satisfied until convincing proof is given that it was fairly conducted and the full price given. The reason assigned for this departure from the rule, is that otherwise a trustee would often be obliged to witness the sacrifice of property which, in

a sense, was already his own, and besides, as in the case of family property, he might wish to preserve it from the hands of strangers, a sentiment in every way commendable and not to be discouraged (*Brannan v. Oliver*, 2 Stew., 47; *Payne v. Turner*, 36 Ala., 623; *Penny v. Jackson*, 85 Ala., 67).

The same exception would probably be allowed in the case of a preferred creditor, who accepts the position of trustee for the payment of debts, but not in a case where the deed of trust provides for the payment of the creditors ratably, for it is then presumed that he has waived his lien, and whatever he does must enure to the benefit of all (*Harrison v. Mock*, 10 Ala., 185).

In South Carolina this exception does not extend to a trustee's purchase at his own sale, but there is a strong inclination to apply it in cases of judicial sales, conducted by an officer of the Court (*Anderson v. Butler*, 31 S. C., 183).

Texas sides with Alabama. Certain property was transferred to a creditor in trust to secure a loan, and by the terms of the deed he was given a power of sale. The debt remaining unpaid, the trustee exposed the property for sale at public auction, and became the purchaser. In a suit to set aside the sale he proved his entire integrity, and the Court refused to interfere (*Scott v. Mann*, 33 Tex., 725; see also *Bohn v. Davis*, 75 Tex., 24).

Both in Texas and Alabama, however, this exception to a salutary rule is regretted by the Court, and is only now allowed because long established.

It may be advisable that a trustee in such a condition should be allowed to purchase but there does

not seem to be any necessity for making his case an exception. The rule ought rather to be strictly enforced, and then upon application to the Court by the trustee for leave to purchase, the fact that he is beneficially interested could be judged sufficient reason for allowing him to bid. See *Cadwalader's App.*, 64 Pa., 293; *Froneberger v. Lewis*, 79 N. C., 426, 435.

(c) The third class, in which is numbered the principal case, also comprises cases where the sale is public, but with the difference that the sale is instigated by creditors and others whose interests are adverse to those of the *cestui que trust*.

In England and generally through out this country it has not been considered that this fact puts the trustee upon so altered a footing that the rule should be relaxed for his benefit. It has, on the contrary, been supposed that in such cases there is afforded as much opportunity to the trustee to betray the interests of his *cestui que trust* by a treacherous use of the information which he may have gained as in cases where he is connected with the conduct of the sale. The same consequence, therefore, attends a trustee's purchase here as in cases where the sale is either his own or ordered and conducted by a court of equity in the interest of the *cestui que trust*, the latter may, if he chooses, avoid it. Or, as it has been expressed, "a trustee who holds the legal title for the use of another will not be permitted to deal with the property for his own benefit, and it makes no difference in his favor that he acquires it at a judicial sale under a superior title:" *Roberts v. Mosley*, 64 Mo., 207.

Wherever the question has arisen,

with the exceptions already noted, the universal rule is that no person can be allowed to purchase an interest in property where he has a duty to perform inconsistent with the character of purchaser on his own account. And in all the States, except Pennsylvania, and, in the case of administrators, Missouri, it is considered that even at a sale under adversary proceedings there exists such an inconsistency. The rule has been applied to an attorney, *Cunningham v. Jones*, 37 Kan., 477; a commissioner of court, *Price's Admr. v. Thompson*, 84 Ky., 219; creditor-assignees, *Houston v. Crutchfield*, 22 Ala., 76; *Janes v. Throckmorton*, 57 Cal., 368; *Bellamy v. Bellamy*, 6 Fla., 62, 114; *Freeman v. Harwood*, 49 Me., 195; *King v. Remington*, 36 Minn., 15; administrators, *Welch v. McGrath*, 59 Iowa, 519; *Dugas v. Gilbeau*, 15 La. Ann., 581; *Froneberger v. Lewis*, 79 N. C., 426; even where the sale is made under execution in their favor, issued before they accepted the office, *Martin v. Wyncoop*, 12 Ind., 266; executor, *Fleming v. Foran*, 12 Ga., 594; *Marshall v. Carson*, 38 N. J. Eq., 250; guardian, *Downs v. Rickards*, 4 Del. Ch., 416; and to trustees proper, *Wells v. Francis*, 7 Col., 396; *Bell v. Webb*, 2 Gill., 163; *Joor v. Williams*, 38 Miss., 546; *Roberts v. Moely*, 64 Mo., 507; *Van Epps v. Van Epps*, 9 Paige Ch., 237; *Jewett v. Miller*, 10 N. Y., 402; *Newcombe v. Brooks*, 16 W. Va., 32.

The Supreme Court of Pennsylvania has again and again sanctioned the principle that a trustee ought not to be permitted to place himself in a position where he will be subjected to a conflict between duty and self-interest. But it has at the same time insisted that at a

sale under adversary proceedings there is no opportunity for self-interest to tempt a trustee to fail in his duty. The reason for this conclusion is given in *Fisk v. Sarber*, 6 W. and S., 18, where the question was, whether the assignee of an insolvent debtor could purchase the latter's property at a sheriff's sale under a mortgage. The property in question, part of that which had been transferred, had been mortgaged to a certain bank, and the interest was so far in arrears that it was doubtful if the property would bring enough to pay both principal and interest. It was understood between *Fisk* and the bank that if he should be the highest bidder at a price not less than \$250.00 below the amount of the principal debt, the bank would extend the time of payment for five years and grant other indulgences. At the sale under the mortgage *Fisk* did bid in the property, and it was decided that his fiduciary character did not prevent his becoming a valid purchaser. The property had been taken out of the trustee's hands and placed beyond his control and influence, *so that he had no duty to perform in regard to it.*

The case was really decided on the authority of a dictum in *Prevost v. Gratz*, 1 P. C. C. Rep., 364, but the Court, per KENNEDY, J., justified the decision on the hypothesis that when the property of the *cestui que trust* is in *gremio legis* the trustee becomes *functus officio*. This decision was followed in *Chorpenning's Appeal*, 32 Pa., 315, and *Lusk's Appeal*, 103 Pa., 152, in the latter of which, however, the fact that the trustees were purchasing to protect their own interests was strongly emphasized.

The freedom allowed by the re-

laxation has been much limited by two decisions which make it a condition of the validity of the trustee's title that he has not either allowed the sale, having other funds of the estate in his hands or occasioned it by his act or procurement. Frank's App., 14 Pa., 531; Parshall's App., 65 Pa., 224.

Mullen v. Doyle is a still further limitation in that it hampers the trustee with the burden of disclosing to the *cestui que trust* all information which may possibly be of use to him. Inasmuch as this course rejects the hypothesis upon which Fisk v. Sarber proceeded the authority of that case may be considered to be weakened to the point of breaking.

The present position would seem to be that taken by Tennessee, namely, the real danger of abuse lies in the control which the trustee or other fiduciary may exercise over the conduct of the sale. Relieve him of this power and his attempts to betray the interests of his *cestui que trust* by using for his own benefit any information which he may derive from his position as trustee will invariably be detected.

In this class of cases Missouri makes an exception in favor of administrators. At a foreclosure sale made by order of the Circuit Court an administrator purchased the property of his decedent. It was argued that the statute which forbids such purchases rendered his title open to objection, but the Court construed the statute to apply only to probate sales, nor was the purchaser here in any sense a fiduciary. An administrator has no concern with or power of disposition over the real estate of his decedent, and to such a sale as this having no duty to perform he came

as a stranger. Dillinger v. Kelly, 84 Mo., 261; Briant v. Jackson, 99 Mo., 585. Where, however, the administrator is obliged by statute, as he is in Pennsylvania, if he finds that the realty is to be taken for the payment of debts, to have the proceedings stayed until he himself can make the sale it is probable that he would be considered a trustee and his case would then be governed by the rule applicable to trustees purchasing at their own sales, for there could be no sale under adversary proceedings. Meanor v. Hamilton, 27 Pa., 137.

By way of general criticism it may be said that in cases where the purchaser occupies a position which opens to him means of information only thus accessible any exception to the rule which closes the door to temptation seems at variance with the teachings of experience. The duty of one who occupies such a fiduciary position obliges him to communicate all information and exert all the care and industry necessary that the estate may be disposed of as advantageously as possible for the *cestui que trust*. It is a dangerous delusion to believe that it is within the power of a court of equity to compel an unwilling trustee to disclose evidence of an unfaithfulness which is the secret of his own heart. The trustee's connection with the sale is not the main reason for the prohibition. "What possible difference can it make in reason and principle in what manner or by whom the sale is made of that which the trustee holds when his duty in his trust relations is to make the property bring its highest price in the protection of the interests of the *cestui que trust*. His duty remains the same; he stands concerned for the

time being as would be the owner of the property in appreciating it." *Marshall v. Carson*, 38 N. J. Eq. 256. Any relaxation is poisonous in its consequences. To prohibit a trustee from purchasing at his own sale merely incites him the more to bring about a sale by another. It is only a substitution of temptations.

There are two cases which, perhaps, deserve mention for to the extent to which dicta are authority they are decisions in favor of the trustee's right to purchase at a sale under adversary proceedings. They are, *Barber v. Bowen*, 47 Minn., 118, and *Allen v. Gillette*, 127 U. S., 589.

In the former, an administrator by order of court sold a part of the property of his decedent in order to discharge certain allowed claims. The guardian of the decedent's minor heirs became the purchaser. The Court cited the few authorities favoring the trustee's right to purchase at a public sale made by another, but the decision in favor of the guardian rested on the circumstance that his fiduciary character did not extend to the property in question since it never was part of the ward's estate, and obviously never would be. In the latter case, which came from Texas, an executor, who was also trustee of the estate of his testator in its entirety, for a two-fold object, first, payment of debts, and then the common benefit of all the heirs and devisees, purchased the undivided share of one of the latter. This share had been mortgaged to secure a loan, and was purchased at a sale in foreclosure of the mortgage. There are dicta in the case in favor of the trustee's right to purchase at a sale under adversary proceedings, but the decision in favor of the execu-

tors rested on a misapprehension of the decisions of the Supreme Court of Texas, "which are our guides in this case." Those cited are cases of purchases by mortgagees at foreclosure sales; and as had been pointed out Texas makes these an exception on the ground of beneficial interest in the purchaser.

There are, however, two methods by which the trustee may acquire an indefeasible title at public sale, even when he is the vendor.

(1) He may by a new contract with his *cestui que trust* divest himself of the character of trustee, but even that transaction will be watched with infinite and the most guarded jealousy since the Court can never be sure that the trustee when entering into the new contract has communicated to the *cestui que trust* all the information which as trustee he may have obtained. *Ex parte Lacey*, 6 Ves., 325.

(2) He may file a bill asking for leave of the Court to become a bidder, and in a proper case the Court will give him permission. "But the power is a delicate one and should always be cautiously exercised, the sale itself being watched with jealousy." *Dundas's App.*, 64 Pa., 325.

There is no good reason for the difference which prevails on this, so important a subject. All are agreed that a trustee must not make any profit from his administration and the failure to insist upon a rigid observance of the rule arises from a misconception of its spirit.

"The rule is intended to secure to the *cestui que trust* the chance of any advantage," and it is the existence of this chance, however doubtful, which precludes the trustee from retaining the property.

ROBERT P. BRADFORD.

DEPARTMENT OF CONTRACTS AND COMMERCIAL LAW.

EDITOR-IN-CHIEF,

FRANK P. PRICHARD, ESQ.,

Assisted by

H. GORDON MCCOUCH,
CHARLES C. TOWNSEND,

CHARLES CHAUNCEY BINNEY,
FRANCIS H. BOHLEN.

PIERCE v. KYLE.¹ SUPREME COURT OF OHIO.

Attorney and Client—Champerty—What Constitutes.

An agreement between client and attorney, by which, in consideration of an assignment to the attorney of a judgment obtained by him for the client, the attorney agrees to render legal services in an effort to collect the judgment, to advance costs and expenses in the first instance, one-half to be repaid by the client in case of failure, and the net proceeds of the judgment in case of success to be equally divided, is not without consideration, nor unlawful on the ground of champerty, and, if otherwise valid, will be enforced.

Opinion by SPEAR, C. J.

AGREEMENTS FOR COMPENSATION BETWEEN ATTORNEY AND CLIENT.

I. *The English Rule.*—In *Kennedy v. Brown*, 13 C. B. (N. S.), 677, there was directly presented the question whether the express promise of the client to pay the advocate for his professional services constituted a legal obligation, and the Court decided that it did not, though it was admitted that such a promise made with an attorney for his services, or even with a barrister in connection with services other than those of advocacy in litigation, could be enforced. The reason for the rule was thus expressed by Chief Justice ERLE: The advocate "is trusted with interests and privileges and powers almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is

in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interest of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning, and this power, again, is in practice, only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is, that the advocate is incapable of contracting for hire to service when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may

¹ Reported in 31 N. E. Rep., 747. Decided June 20, 1892.

maintain that client's right, together with duty to the Court and himself, binding him to guard against abuse of the powers and privileges entrusted to him by a constant recourse to his own sense of right."

II. *The American Rule.*—In nearly all of the States the doctrine thus laid down is held to be inapplicable to the social conditions of this country and not a part of our inherited jurisprudence. See the note of Judge MITCHELL to *Kennedy v. Broun*, *supra* Am. Law Reg. (N. S.), 372. A representative case is *Bayard v. McLane*, 3 Harr., 219, where it is said by the Court: "The English doctrine on this subject is founded on considerations of public policy, which, in general, is one of the most uncertain and therefore unsafe grounds of legal judgment. Doubtless where the policy is clear it is good ground of decision, but like all arguments *ab convenienti*, of which it is one, the weight, and even the existence of the inconvenience may be doubtful, or may be counterbalanced by a greater inconvenience on the other side. (Ram. on Legal Judgment, 57.) It is also an unstable ground of judgment, varying with the conditions of the same community, and applicable only to communities similarly situated. The policy of the law springs out of the condition of the people who are to be bound by it. In England it has been deemed against public policy to permit counsel to contract with their clients for compensation, first, because of some vague notion that it would be against the dignity of the profession to demand fees; and, secondly, from the apprehension that clients might be oppressed by such bargains; yet, whatever is the theory, we know

that, in point of fact, the counsel does take fees under the polite name of honoraria; nay more, that being unable to recover anything by the aid of law, he requires the cash in hand before he opens his mouth in the cause. Is there no doubt about the policy of a principle that operates thus? Is there less danger of oppression of the client in requiring payment of the money down, than by taking his contract or bond? The lawyer in either case makes his own terms, which the client either agrees to or employs another. But the poor suitor may not have the present means of payment, and this policy may deprive him of counsel. He may have credit—credit founded even on his rights in the suit which he is about to prosecute—credit especially with the lawyer, who understands those rights; but for want of money to pay down in advance, the courts of justice may be effectually closed against him. His rights are nothing unless he can have the means of enforcing them."

But it is to be noted that the English rule, drawing a distinction between attorneys and advocates, has been recognized in New Jersey. In *Schomp v. Schenck*, 40 N. J. Law, 195, it was said by the learned judge who delivered the opinion, "The American decisions on the subject have not been overlooked, and it is quite understood that the weight of such decisions is in favor of considering the English doctrine relating to this topic, even as it relates to advocates, as obsolete and inapplicable to the times. All I wish to say is that I cannot concur in this view, for the rule in question has always flourished in full vigor as a part of the common law, and has never, during any interval of time,

fallen into disuse; and that, as its only foundation was its supposed efficacy in sustaining the honorable standing of the advocate, I can by no means admit that such a rule is alien to the professional ethics of this country. The principle that the advocate cannot stipulate with his client for his perquisites is one of the established customs of our inherited jurisprudence, and is entirely consistent with our social conditions, and therefore, in my opinion, is not to be eliminated except by legislation."

III. *Contingent Fees.*—Assuming, then, the validity of an express contract between the attorney or counsellor-at-law and his client for the payment by the latter for professional services to be rendered by the former, we turn to examine those cases where the contract is for the payment of contingent fees. Such contracts are always jealously scrutinized by the Court on account of the confidential relations of the parties, and no unconscionable bargain will be sustained; but, on the other hand, when made in good faith, without suppression of facts or exaggeration of apprehended difficulties, and the compensation stipulated for is reasonable, they will, in the Federal courts, and, it is believed, in those of all the States except Tennessee, be enforced as not oppose to public policy." *Ex parte Plitt*, 2 Wall., Jr., 453; *Wylie v. Coxe*, 15 How., 415; *Wright v. Tibbits*, 1 Otto, 252; *Jeffries v. M. L. Ins. Co.*, 110 U. S., 305; *McPherson v. Coxe*, 6 Otto, 404; *Post v. Mason*, 91 N. Y., 539; *Dahms v. Sears*, 13 Or., 47; *Perry v. Dicken*, 105 Pa., 83; *Kusterer v. Beaver*, 56 Wis., 471; *Walker v. Biety*, 24 La., 349; *Whithead v. Ducker*, 11 S. M. (Miss.), 98; *Quint*

v. Ophis, 4 Nev., 305; *Christy v. Sawyer*, 44 N. H., 98; *South v. State*, 17 Ark., 608; *Backus v. Byron*, 4 Mich., 535; *Bent v. Priest*, 10 Mo. App., 543; *Jewel v. Neidy*, 61 Iowa, 235; *Stansell v. Lindsay*, 50 Ga., 360; *Newkirk v. Cohen*, 18 Ill., 449; but in England they have been held void under the statutes against maintenance, *Earle v. Hopwood*, 9 C. B., 566.

Contracts to pay contingent fees for professional services in preparing and advocating just claims against the government have also been supported in this country. *Stanton v. Emery*, 3 Otto, 548; *Taylor v. Bemiss*, 110 U. S., 42.

But contracts for lobbying are not recognized as professional services of a legitimate character and are void. *Triest v. Child*, 21 Wall. 450.

Where, however, the contract provides that no compromise or settlement of the case shall be made without the consent of the attorney, it has been held in some of the States that such a condition is *contra bonos mores*, and the contract void. *Wukley v. Hall*, 13 Stanton Ohio R., 175; *Taylor v. Gilman*, 58 N. H., 417; *Boardman v. Thompson*, 25 Iowa, 487.

Though in others, such condition has been held not to be against public policy. *Hoffman v. Vallejo*, 45 Cal., 564.

But a receiver of a national bank has no power to contract to pay a contingent fee (*Barrett v. Henrietta Bk.*, 78 Texas, 222), nor a municipal corporation (County of Chester *v. Barber*, 97 Pa., 455), nor county commissioners (*Platt v. Gerard*, 12 Neb., 244).

IV. *The Effect of the Rules against Champerty on Contracts between Attorney and Client.*—Such seems to be the law bearing

on contracts between lawyer and client outside of the doctrine of champerty, and it is now proposed to briefly examine how far in this country they are effected thereby. Blackstone defines champerty as "a species of maintenance and punished in like manner; being a bargain with a plaintiff or defendant *campum partice*, to divide the land or other matters sued for between them, if they prevail at law; whereupon the champertor is to carry on the suit at his own expense," while Hawkin's definition, followed by Coke and Sir William Grant, is "the unlawful maintenance of a suit in consideration of a part of a debt or other thing in dispute."

The English cases adopt the definition of Hawkins, *Stanley v. Jones*, 7 Bing., 369; *Sprye v. Porter*, 7 El. & Bl., 80; *In re Attorneys and Solicitors Act*, 1 Ch. Div., 573.

Champerty so defined has been declared part of the common law of Massachusetts (*Lathrop v. Bank*, 9 Met., 491; *Ackert v. Barker*, 131 Mass., 436, but held not to apply to contracts to prosecute cases before Court of Claims. *Murray v. Sprague*, 148 Mass., 18), Indiana (*Scobey v. Ross*, 13 Ind., 177, and it applies to contracts to prosecute cases against the government, *Coquillard v. Bearss*, 21 Ind., 479), Kentucky (*Davis v. Sharron*, 15 B. Mon., 64, though a contract for a fee equal to one-quarter of the value of land recovered by suit, not to be paid until land should be sold was held not champertous in *Ramsey v. Trent*, 10 B. Mon., 341), and North Carolina (*Martin v. Amos*, 13 Ire., 201), and contracts by which the attorneys are to be paid for their services a part of the money or thing recovered are there held void, irre-

spective of who paid the expenses of the suit. These cases hold that the *mode of compensation* constituted at common law the gist of the offence. To this group should be added Tennessee by whose code, § 2450, it is provided, "No party plaintiff or intending to be plaintiff to a suit at law or in equity shall promise or agree to pay or give any greater or less sum of money or any greater or less part of the thing litigated upon any contingency or upon the event of the suit," and probably Alabama (*Elliott v. McClelland*, 17 Ala., 206), District of Columbia (*Stanton v. Haskin*, 1 McArthur, 558), New Hampshire (*Butler v. Legre*, 62 N. H., 350), and Maine, since there is no statute in that State governing the matter, and it has been decided that whatever was part of the common law of Massachusetts before the separation of Maine from that State is part of the law of Maine to-day unless changed by legislation (*Hovey v. Hobson*, 51 Me., 62), though these cases have not in so many words approved of Hawkin's definition.

Each of the following States has declared that only the modified rule against champerty as defined by Blackstone is part of its common law and therefore contracts by an attorney for a contingent fee out of the avails of the suit have only been held void where the attorney has agreed to pay the costs:

Delaware (*Bayard v. McLane*, 3 Harr., 139), Georgia (*Moses v. Bagley*, 55 Ga., 283), Illinois (*West Park Coms. v. Coleman*, 108 Ill., 591), Iowa (*Jewel v. Neidy*, 61 Iowa, 299), Missouri (*Duke v. Harper*, 66 Mo., 51), Mississippi (*Moody v. Harper*, 38 Miss., 601), West Virginia (*Anderson v. Caraway*, 27 W.

Va., 396), Virginia (Nickels *v.* Kane, 82 Va., 309), Wisconsin (Allard *v.* Lamirande, 29 Wis., 502), Kansas (Aultman *v.* Waddle, 40 Kan., 195), and Ohio (for such seems the effect of the decision in the case at the head of this note).

And to them should probably be added South Carolina (Hand *v.* R. R. Co., 21 S. Car., 182), Maryland W. U. Tel. Co. *v.* Semmes & Clark, 73 Md., 19), Oregon (Dahms *v.* Sears, 13 Or., 47), Nevada (Gruber *v.* Baker, 20 Nev., 468), and Rhode Island (Martin *v.* Clark, 8 R. I., 389, and see note to Orr *v.* Tanner, 17 Am. Law Reg., 759), though the position of the Courts of these is not clearly defined.

These cases hold that at common law the gist of the offence was the maintenance, the unlawful meddling in another's suit which was supposed to suppress justice and truth, or at least to work delay, and the agreement to do this for a part of the thing in suit was an aggravation of the offence, because of its violation of the rule of common law that choses in action are not assignable, to support which the doctrine of maintenance was adopted. "And upon no other reason," says Judge HARRINGTON, in Bayard *v.* McLane, 3 Harr., 209, "can we conceive why a bargain for a part, or the whole of a thing in suit (independently of the maintenance) should have been an offence at common law. Grant that no such evils flow from the selling a thing in action; grant that such a sale is proper, and may be upheld and enforced by the law; and what conceivable reason is there for saying that a bargain to give a thing in suit, for lawful aid of counsel in the prosecution of such suit, is itself unlawful. But this rule of the com-

mon law has long gone into disuse even in the English courts; if any traces of it remain, it is only for the purpose of giving form to certain kinds of actions. In this country the rule is actually reversed. The laws of alienation in respect to every species of property promote its transfer as more consistent with the condition of things in action, or of part of a thing in suit, may be made; and, by the common law, it is lawful for attorneys and counsel in the regular exercise of their profession, to maintain the suits of others. If the services, therefore, be lawful, and the mode of compensation be now lawful, how can such a contract be champertous and unlawful?"

Referring to the English statutes against champerty which were passed in the reign of Edward I., and seem to have introduced a new feature into the definition of champerty, Judge HARRINGTON continues, "The evil which they were designed to meet was the conveyances of pretended titles by those who were unable and unwilling to incur the expense of prosecuting them, to men of wealth and power who should carry on the prosecution at their own expense and divide the proceeds. It was a maintenance not only by influence and power, but by the actual means of conducting a suit; and that on a contract for a part of the thing in action, which by the common law itself was unlawful. Hence, says the statute champertors be they that move pleas and suits or cause to be moved either by their own procurer or by others and sued for at their proper cost, for to have part of the land in variance or part of the gains. This important ingredient of paying or contributing to the expenses of the

suit seems ever since to have been regarded as essential to constitute the offence of champerty. * * * The payment of the expense is no part of the business of a lawyer under our practice. In so doing, he acts out of his character as a professional man and maintains the suit in a way which that character does not justify. But so long as his contract stipulates only for such services as he may lawfully render without being guilty of maintenance, it is not vitiated on any ground of champerty, because those services are to be required out of the thing in suit, which by our law is a proper subject of contract."

Except in the cases specified by paragraphs 73 and 74 of its code, the doctrine of champerty has been repudiated in New York as not part of the common law of that State: *Coughlin v. R. R. Co.*, 71 N. Y., 443.

In Louisiana, the English Common Law not being part of its jurisprudence, the matter is regulated by Article 2624 of its code.

In Michigan, by provision of H. and S. Code, paragraph 9004, and in Minnesota, Gen. St., 1878, c. 67, § 1, attorneys and clients are allowed to contract as they please as to compensation, and this provision has effectually done away with the doctrine of champerty in those States: *Whildey v. Crane*, 63 Mich., 720; *Canty v. Lattimer*, 31 M., 239. The courts of Texas: *Bentinck v. Franklin*, 38 Texas, 58; California: *Matthewson v. Fitch*, 22 Cal., 86; New Jersey: *Schomp v. Schenck*, 40 N. J. L., 195; and apparently those of Arkansas: *Lytle v. State*, 17 Ark., 608; Vermont: *Danforth v. Streeter*, 28 Vt., 490; Connecticut: *Richardson v. Rowland*, 40 Conn., 565, and note to same, 14

AM. LAW REG., 78; and Pennsylvania (for the suggestion thrown out by *PAXTON, J.*, in *County of Chester v. Barber*, 1 Out., 463, seems to have been confirmed by the decision of *Munna's Appeal*, 127 Pa., 474, where a contract by an attorney to raise up an administration, pay all the costs of suit and divide the gross proceeds recovered was sustained), have in effect declared that the common law doctrine of champerty, so far as it applies to contracts between lawyer and client, forms no part of the law of those States.

The reasons for so holding are thus set forth in *Matthewson v. Fitch*, *supra*: "There is no statute upon the subject in this State, and we have no doubt that the Legislature of 1850, when it adopted the statutes which were deemed necessary to organize the legal system of the State by omitting to enact any such statute, acted in the spirit of the decisions which hold such laws inapplicable to this country, and with the direct purpose that there should be no law relating to the subject. In our judgment, in the absence of such a statute, the offence of maintenance is unknown to the laws of this State."

Chief Justice BEASLEY, in delivering the opinion of the Court in *Schomp v. Schenck*, *supra*, expressed himself thus: "It appears to me safe to say that, upon examination, any inquirer into this branch of jurisprudence will be satisfied that the entire doctrine of maintenance was the product of a state of society very different from that which now exists or has ever existed in this State.

"The truth is, there is the best reason for believing that the entire

law of maintenance, regarding it as an intelligible subject, is the creation of the English statutory law and of the judicial constructions of such law, and the consequence is, that when this set of Acts was designedly left out of our statute book, there existed no rational ground for the contention that any part of this law of maintenance in any form remained in force in this State."

In most of the States it has been held that even though the special contract between an attorney and his client be void for champerty, he does not on that account forfeit his claim to compensation for his services, but may recover the same on a *quantum meruit*: Weeks on Attorneys, § 345, and cases there cited.

But the contrary was held in *Grell v. Levy*, 16 C. B. (N. S.), 73. See also *Halloway v. Lowe*, 7 Port. (Ala.), 488, and *Lowe v. Hutchinson*, 37 Me., 196; *Davis v. Sharron*, 15 B. Men. (Ky.), 64.

It is to be observed that the law against champerty has never forbidden an attorney to advance money for incidental costs: *Lewis v. Samuel*, 8 Q. B., 485; but see New York Code, § 73, 74, which forbids an attorney to make any loan or advance or agreement to loan or advance as an inducement to place in his hands any claim for collection.

After suit ended, an assignment by client to attorney of part of the judgment recovered in payment of his fee will not be avoided even though made in fulfilment of a champertous contract: *Rose v. the Railroad Company*, 55 Iowa, 691.

It is worthy of note that the variance in the decisions on the subject of champerty, in the States

where that doctrine is recognized at all, is due solely to whether the definition of HAWKINS or that of BLACKSTONE is accepted as correctly stating what was the common law of England on the subject, so that there is but little discussion as to the wisdom of such a rule under present conditions in the United States. The ground-work on which all these decisions rest being that the doctrine is part of the inherited jurisprudence of the State, it is unlikely that they will be modified, and if a change in the law is desirable, it must come from the Legislature. Viewed simply as a measure of public policy, considered in its relation to contracts between lawyer and client, opinions would probably differ as to its utility. Given the business and social relations found to-day in the United States, the doctrine seems to the writer both out of time and out of place. With an upright judiciary, there is small incentive to the lawyer to waste either time or money in the prosecution of unjust claims, and under the jealous scrutiny of the court to which such contracts are subject, the danger to the client from an unconscionable bargain is inconsiderable. Certainly the client is not the less well served if the efforts of his attorney be stimulated by his pecuniary interest in the case, and though the attorney may in rare cases be thereby tempted to forget the fidelity he owes to the court, yet it is questionable whether the prohibition of such contracts lessens their number, and there are other methods of preserving the honor of the bar than by putting its members under this disability.

To the credit of the profession be it said that despite such laws a

necessitous client is seldom forced' to abandon a just claim for lack of means to prosecute the same; though their existence makes it possible for an ungrateful client to

defeat a just claim for services rendered without the certainty of reward.

H. GORDON MCCOUCH.

GARCELON *et al.* v. TIBBETTS.¹ SUPREME JUDICIAL COURT OF MAINE.

Real Estate Broker—Commissions and Compensation.

To entitle a broker who has been employed to sell real estate to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms.

This implies and involves the agreement of buyer and seller, the meeting of their minds, effected through the agency of the broker; and if through their failure to come to an agreement, the contract of sale is not consummated, he is not entitled to commissions, nor any recompense for the time and labor he has spent.

When a broker is authorized to sell a certain piece of real estate for a specified sum, but nothing is said as to the kind of a deed to be given; and the broker procures a prospective purchaser, who refuses to complete the contract of sale unless the owner of the land will give him a warranty deed, which the latter, having a perfectly good title, declines to do, and the sale consequently falls through; the broker fails to fulfil the conditions of his contract, and is not entitled to commissions.

Opinion by FOSTER, J.

THE RIGHT OF A REAL ESTATE BROKER TO COMMISSIONS.

I. In the absence of any special clause in the contract of agency affecting his rights, the claim of a real estate broker to commissions upon the sale or exchange of real estate placed in his hands for that purpose depends upon the completion of the contract through his agency. "The fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue:" *Sibbald v. Bethlehem Iron*

Co., 83 N. Y., 378. In order to fulfil this duty, and substantiate his claim, it is necessary that he should produce a prospective purchaser who is able, ready and willing to take the land on the vendor's terms: *Wylie v. Bank*, 61 N. Y., 416; *McGavock v. Woodlief*, 20 How., (U. S.) 221; *Kock v. Emmerling*, 22 How., (U. S.) 72; *Keys v. Johnson*, 68 Pa., 42; *Clendenon v. Pancoast*, 75 Pa., 213; *Hyams v. Miller*, 71 Ga., 608; *Kalley v. Baker*, 29 N. E. Rep., 1091; *Garcelon v. Tibbets* (the principal case) 24 Atl. Rep., 797. These terms must be strictly complied with in all essential particulars:

¹ Reported in 24 Atl. Rep., 797.

Bradford v. Menard (Minn.), 28 N. W. Rep., 248. When a contract with a broker states the terms of sale to be \$900 cash, and \$1000 in one year, the broker was denied the right to commissions on producing a purchaser who offered \$100 cash, \$800 in thirty days, and \$1000 in a year: *Harwood v. Triplett*, 34 Mo. App., 273. If the land is to be sold for a certain price, and the purchaser offers part only in cash, the owner may refuse to accept him without making himself liable to the broker: *Morrill v. Davis*, (Neb.) 43 N. W. Rep., 1146. But when the agent is to receive all above a certain sum as compensation, and the land is to be sold for cash, a purchaser who pays the stipulated sum in cash, and the balance in notes, satisfies the contract: *Van Gorder v. Sherman*, 46 N. W. Rep., 1087. When the sale is to include two surveys, and the broker only succeeds in disposing of one, he can claim no commissions on the sale: *Armstrong v. O'Brien*, 19 S. W. Rep., 268.

The vendor may waive his right of refusal, however, and accept a sale made by a broker upon different terms from those at first proposed; and if he does so he becomes liable for commissions: *Lockwood v. Halsey*, 41 Kans., 166; S. C., 21 Pac. Rep., 98; *Wetzell v. Wagoner*, 41 Mo. App., 509. When the purchaser agrees to pay the stated price, but the owner of the land sells for less, on discovering a mistake in the quantity, the broker is entitled to commissions on the reduced price: *Hoefling v. Hambleton*, 19 S. W. Rep., 689. So, when the broker is required, as a condition precedent, to furnish his principal with the name of the purchaser,

but the principal makes no objection on that ground, while absolutely disaffirming the sale, he will be held to have waived it: *Duclos v. Cunningham*, 102 N. Y., 678. If the principal accept the purchaser, whether upon the same or different terms, the broker is entitled to his commissions, even though the sale finally falls through, unless the contract made the right to commissions dependent upon the consummation of the sale: *Potvin v. Curran*, 13 Neb., 302; *Casady v. Seely*, 29 N. W. Rep. (Iowa), 932; *Carson v. Baker*, 29 Pac. Rep., 1134; *Seattle Land Co. v. Day*, (Wash.) 27 Pac. Rep., 74.

II. In order to prove a right to commissions, the broker must first show that he had authority to enter into negotiations for the sale of the property. Mere voluntary services are not the ground of a valid claim: *Cook v. Welch*, 9 Allen, (Mass.) 350; *Platt v. Patterson*, 7 Phila. (Pa.), 135; *Tinkham v. Knox*, 18 N. Y. Suppl., 433; *Coffin v. Luixweiler*, 34 Minn., 320. This authority, however, need not be in writing: it may be given by parol, for such an agreement is not within the Statute of Frauds: *Real Estate Exchange v. Stephens*, (Mich.) 38 N. W. Rep., 685; *Monroe v. Snow*, (Ill.) 23 N. E. Rep., 401; *Fischer v. Bell*, 91 Ind., 243; *Smith v. Armstrong*, 24 Wis. 446; *Turbeville v. Ryan*, 1 Humph. (Tenn.) 113; *Mumley v. Doherty*, 1 Verg. (Tenn.) 26; *Fiero v. Fiero*, 52 Barb. (N. Y.), 288; *Blood v. Goodrich*, 12 Wend. (N. Y., 525; *Worrall v. Munn*, 5 N. Y., 229; *Desmond v. Stebbins*, 140 Mass., 339. When not express, authority may be inferred from the correspondence or course of dealing between the parties: *Fisk v. Henarie*, 13 Or., 156; but the infer-

ence must be clear and unequivocal. When the principal wrote, "You might let me know what per cent. you charge, also what other expenses will arise, so that I may know exactly what to figure on;" the Court held that the authority of the agent was limited, and that before any definite action could be taken, the matter must be again submitted to the principal: *Merritt v. Wasserich*, 49 Fed. Rep., 785. An owner wrote to a broker, "I will be in D. the last of April or first of May. Wish you would have a purchaser. Think I ought to have \$17,000." The broker telegraphed on April 20, "Lots sold for \$16,000 cash;" to which the owner replied, "I will not sell for less than \$17,000." On May 3d, the day of her arrival in D., the broker telegraphed again, "Sold property for \$17,000 27th" of April. She did not receive the telegram until after she had reached D., and then repudiated the transaction. Under these circumstances it was held that the agent had no authority to consummate the sale: *Sullivan v. Leer*, 29 Pac. Rep., 817. When, however, a firm of real estate brokers send a letter to the owner of land, inclosing their business card, informing him of the nature of their business, and asking him whether the land is on the market, and its price, and the owner at once replies, giving price, terms and conditions, and stating the amount of commissions he is willing to allow, and they at once begin to act as agents for the sale of the land, they are to be considered as authorized agents: *Stephens v. Scott*, 43 Kans., 285; *S. C.*, 23 Pac. Rep., 555.

When a duly authorized agent appoints a sub-agent, within the scope of his authority, though with-

out the knowledge of his principal, the sub-agent is entitled to commissions for producing a purchaser after the revocation of the agent's authority, but without notice to him: *Lamson v. Sims*, 48 N. Y., Super. Ct., 281. The mere ordinary authority of a wife for her husband, however, is not sufficient to give authority to an agent employed by her to sell the lands of her husband: *Harper v. Goodall*, 62 How. Pr. (N. Y.) 288. A man is not bound by a contract for the sale of his land made by a broker in accordance with letters and telegrams sent by his wife, who, although attending to his correspondence and the rent of his property, had no written authority to contract for him, and sent the letters and telegrams without informing him of their contents: *Edwards v. Tyler*, 31 N. E. Rep., 312. When, however, the husband is the general agent of the wife to sell her property, a broker employed by him is her broker: *Carroll v. O'Shea*, 19 N. Y. Suppl., 374; *Barnett v. Glutling* (Ind.) 29 N. E. Rep., 927. Authority may also be inferred from ratification of the broker's acts: *Low v. Conn.*, etc. R. R., 46 N. H., 284. Where a broker volunteered himself as agent to premises belonging to a city, and represented to the defendant that he was authorized to negotiate the ease, but in an interview with the city comptroller the defendant was informed that the city would pay no commission, and plaintiff suggested that his commission is one per cent., which defendant promised to pay, there was evidence to show that defendant employed the broker: *Myers v. Dean*, 30 N. E. Rep., 259. The execution of a deed by a wife to a purchaser secured by

brokers by the husband without express authority, and the receipt by her of the proceeds of sale, will make her liable to the brokers for commissions: *Barnett v. Glutting* (Ind.) 29 N. E. Rep., 927; see *Sims v. Rockwell*, 31 N. E. Rep., 484. One who sells the real estate of a corporation must establish employment by a competent party, authorized to bind the corporation, or prove a subsequent knowledge, adoption and ratification of his services by the corporation: *Twelfth St. Market Co. v. Jackson*, 102 Pa., 269; *Copeland v. Stoneham Tannery Co.* (Pa.) 21 Atl. Rep., 825. An intention to ratify an unauthorized employment of a broker by an attorney is shown by a promise to pay the broker the sum promised by the attorney: *Markham v. Waahburn*, 18 N. Y. Suppl., 355; but in general, before ratification can be inferred, it must be shown that the owner of the land had knowledge of the particular conditions of the transaction: *Niazé v. Gordon* (Cal.) 30 Pac. Rep., 962.

When a will gives authority to the executors to sell real estate, they can employ an agent, and the estate will be liable for his commissions: *Armstrong v. O'Brien*, 19 S. W. Rep., 268; but a promise to compensate a broker if he finds a purchaser, followed by a sale by the promisor as administrator, is a personal contract, unconnected with the ownership of the lands: *Moore v. Daiber*, 52 N. W. Rep., 742.

III. It is also necessary that the prospective purchaser should be pecuniarily able, as well as willing, to consummate the contract of sale, or if he make default, to respond in damages for his breach of contract: *Iselin v. Griffith*, 62 Iowa, 668. There has been a conflict of

opinion as to the question upon which side lies the burden of proof of this fact. It is asserted to be on the principal in *Goss v. Brown*, 31 Minn., 484; S. C., 18 N. W. Rep., 290; *Hart v. Hoffman*, 44 How. Pr. (N. Y.) 168; *Simonson v. Kissick*, 4 Daly (N. Y.) 143; *Cook v. Kroecker*, 4 Daly (N. Y.) 268. On the other hand it was asserted to rest upon the broker in *Iselin v. Griffith*, *supra*; S. C., 18 N. W. Rep., 302; *Coleman's Ex'r. v. Meade*, 13 Bush, (Ky.) 358; *Pratt v. Hotchkiss*, 10 Ill. App., 603; *Leahy v. Hair*, 33 Ill. App., 461; *Zeidler v. Walker*, 41 Mo. App., 118. The former would seem to be the better opinion, however, for, as was said in *Grosse v. Cooley*, 43 Minn., 188, the presumption is that the purchaser is solvent: *McFarland v. Lillard* (Ind.) 28 N. E. Rep., 229. His solvency does not form a condition precedent, but the lack of it is a matter of defence.

When the sale is not consummated and the seller repudiates it on account of the financial inability of the purchaser, the broker is not entitled to commissions; and where the purchaser, on the last day for payment of the balance of the purchase money, asked for additional time, and the seller waited for four weeks before breaking off the transaction, there is good ground to infer pecuniary inability: *Butler v. Baker*, 23 Atl. Rep., 1019. If the sale is actually made, however, and the binding contract entered into, which can be enforced, the owner will be held to have determined in favor of the responsibility of the purchaser, and to have assumed the risk of his proving irresponsible: *Wray v. Carpenter* (Col.) 27 Pac. Rep., 248. When the purchaser is solvent and able to pay,

but for some reason defaults and allows the vendor to declare a forfeiture under the contract, the broker is entitled to his commission: *Betz v. Loan Co.* (Kan.) 26 Pac. Rep., 456.

IV. In order to substantiate a claim for commissions, the sale must have been effected through the agency of the broker who claims them. It is not essential, however, that he should actually carry the transaction to a conclusion; it is sufficient if the owner concludes the sale by following out the negotiations begun by the broker: *Butler v. Kennard* (Neb.), 36 N. W. Rep., 579; *Nicholas v. Jones* (Neb.), 37 N. W. Rep., 679; *Wilson v. Sturgis* (Cal.), 16 Pac. Rep., 772; *Dreisback v. Rollins* (Kan.), 18 Pac. Rep., 187; *Desmond v. Stebbins*, 140 Mass., 339; *Bickart v. Hoffman*, 19 N. Y. Suppl., 472; or if the sale is due to the exertions of the broker: *Jones v. Berry*, 37 Mo. App., 125; *Scott v. Patterson* (Ark.), 13 S. W. Rep., 419. When a broker who has property in his hands for sale advertises it and gives information about it to a third party, who communicates such information to a friend, and the friend afterwards buys directly from the owner, the broker is entitled to commissions: *Lincoln v. McClatchie*, 36 Conn., 136; see *Newhall v. Pierce*, 115 Mass., 457. The same is true where a neighbor, seeing the advertisement, directs a buyer to the farm: *Anderson v. Cox*, 16 Neb., 10. But when the broker had negotiated with one who refused to buy, but advised another person to do so, and this third person bought directly of the owner, without any preliminary negotiations with the broker, it was

held that there was nothing to show that the broker procured the sale: *Johnson v. Seidel* (Pa.), 24 Atl. Rep., 687. If the prospective purchaser breaks off the negotiations with the broker and afterwards enters into fresh negotiations with the principal, who succeeds in effecting a sale, the broker is not entitled to any commission: *Lipe v. Ludewick*, 14 Ill. App., 372; *Alden v. Earle* (N. Y.), 24 N. E. Rep., 705. And in general, when the efforts of the broker have been unsuccessful, it does not matter that they contributed in some degree to the final result: *Sibbald v. Bethlehem Iron Co.*, 83 N. Y., 378. If parties with whom he has negotiated unsuccessfully buy through other agents, without any interference on the part of the owner, he has no valid claim: *Hendricks v. Daniels*, 19 N. Y. Suppl., 414; *Rarp v. Cummins*, 54 Pa., 394; *Doonan v. Ives*, 73 Ga., 295; *Wylie v. Marine National Bank*, 61 N. Y., 416; *Livezey v. Miller*, 61 Md., 336; *Smith v. McGovern*, 65 N. Y., 574; *Ward v. Fletcher*, 124 Mass., 224; *Farrar v. Brodt*, 35 Ill. App., 617. And, of course, if the parties fail to come to an agreement on the terms on which the vendor insists, and the negotiations are consequently unsuccessful, he has not performed his contract to find a purchaser, and has not earned his commissions: *Garcelon v. Tibbets* (the principal case) 24 Atl. Rep., 797.

If the contract of agency is fixed as to duration, the broker must produce a purchaser within the time limited; but not so that all the papers necessary to complete the sale can be executed within that time: *O'Connor v. Semple*, 57 Wis., 243. When, however, a purchaser

produced on the last day of the specified time wishes time to investigate the title, it is too late, and the vendor can rightfully refuse to entertain the proposition: *Watson v. Brookes*, 11 Oreg., 271; see *McCarthy v. Cavers*, 66 Iowa, 342. If he have to complete the sale by a certain date, the transaction must be closed then or within whatever extension the vendor may grant: *Emery v. Atlanta Real Est. Exch.*, 14 S. E. Rep., 556. But if he have a reasonable time in which to find purchaser, a rise in value during that time will not excuse the refusal of the vendor to accept a purchaser on the original terms: *Smith v. Fairchild*, 7 Col., 510.

The services rendered by the broker must also be of value: and he does not render any efficient service by securing a proposition from a person with whom the owner has been in treaty prior to the time when the land was placed in the broker's hands, and who, on the same day that he makes the offer through the broker, offers the same amount to the owner: *Hartley v. Anderson* (Pa.), 24 Atl. Rep., 675; see *White v. Templeton*, 79 Tex., 454.

The contract of sale effected by the broker need not be completed by conveyance: *Hayden v. Grills's Admrs.*, 42 Mo. App., 1. It is enough that a valid contract of sale is entered into by the owner with the purchaser introduced to him by the broker, even though the vendor may afterward refuse to perform the contract; for the owner may, if he so choose, reap the benefit of the transaction by a suit for specific performance: *Love v. Miller*, 53 Ind., 294; *Love v. Owens*, 31 Mo. App., 501; *Veazie v. Parker*, 72 Me., 443; *Kerfoot v. Steele*, 113 Ill., 610.

V. When, however, the broker has complied with all the terms of his contract, and has procured a purchaser and bound him by contract to take the land at the vendor's terms or such modified terms and conditions as the vendor has seen fit to accept, his right to commissions is absolute and cannot be defeated by any inability on the part of the vendor to fulfil his part of the contract, or by any attempt on the part of the latter to evade his responsibility to the broker: *Gross v. Stevens*, 32 Minn., 472; *Love v. Miller*, 53 Ind., 294; *Mooney v. Elder*, 56 N. Y., 238; *Knapp v. Wallace*, 41 N. Y., 477; *Higgins v. Moore*, 34 N. Y., 417; *Chapin v. Bridges*, 116 Mass., 105; *Drury v. Newman*, 99 Mass., 256; *Cook v. Fisher*, 12 Gray (Mass.), 491; *Rice v. Mayo*, 107 Mass., 550; *Delaplaine v. Turnley*, 44 Wis., 31; *Phelan v. Gardner*, 43 Cal., 306; *Nesbit v. Helsær*, 49 Mo., 383.

If the purchaser refuses to complete the sale on account of a defect in the title of the vendor, of which the broker was ignorant, or on account of misrepresentations of the vendor, the broker is still entitled to his commissions: *Glentworth v. Luther*, 21 Barb. (N. Y.), 145; *Doty v. Miller*, 43 Barb. (N. Y.), 529; *Schwartz v. Yearley*, 31 Md., 270; *De Santos v. Taney*, 13 La. Arm., 151; *Gonzales v. Broad*, 57 Cal., 224; *Cook v. Welch*, 9 Allen (Mass.), 350; *Topping v. Healey*, 3 F. & F., 325; *Roberts v. Kimmins*, 65 Miss., 332; S. C., 3 So. Rep., 736; *Mooney v. Elder*, 56 N. Y., 238; *Hannan v. Moran*, 71 Mich. 261; S. C., 38 N. W. Rep., 909; *McLaughlin v. Wheeler* (S. Dak.), 47 N. W. Rep., 816; *Kyle v. Kippey* (Or.), 26 Pac. Rep., 308; *Conklin v. Krakauer*, 70 Tex., 735; S. C.,

11 S. W. Rep., 117; *contra*, *Blankenship v. Ryerson*, 50 Ala., 426. "The implication, when property is placed in the hands of a real estate broker for sale, is that the owner has a good title thereto, and that the purchaser can get the property unincumbered. When, therefore, a proposed purchaser agrees to buy, nothing being said about the title, he has the right to believe he will get a good title." *Loan Co. v. Thompson*, 86 Ala., 146; S. C., 5 So. Rep., 473; *Gerhart v. Peck*, 42 Mo. App., 644; *Gauthier v. West*, 45 Minn., 192; S. C., 47 N. W. Rep., 656. And in such a case the agent has a right to presume that the title is unobjectionable and to negotiate a sale upon that presumption: *Cheatham v. Yarbrough*, 15 S. W. Rep., 1076. If, however, the agent was aware of the defect in the title of his principal, would seem that he has no right to commissions on such an ineffectual sale: *Tombs v. Alexander*, 101 Mass., 255. The fact that the purchaser's objection to the title is groundless will not affect the broker when a written contract of sale has been executed; for in such a case the vendor has the option of enforcing specific performance, and his neglect to avail himself of that remedy ought not to prejudice the broker: *Parker v. Walker* (Tenn.), 8 S. W. Rep., 391; but if the contract rests in parol, and is therefore unenforceable, the broker is not entitled to claim commissions, presumably on the ground that it was his duty to see that the sale was made effective by the execution of a valid and binding contract: *Gilchrist v. Clarke* (Tenn.), 8 S. W. Rep., 572. Even if the contract with the broker expressly provides that the broker's commissions are to be paid out of the pro-

ceeds of the sale, if the sale falls through on account of a defect in the title of the vendor, the broker is nevertheless entitled to commissions: *Cheatham v. Yarbrough* (Tenn.), 15 S. W. Rep., 1076.

If it was agreed in the contract with the agent that the wife of the vendor should join in the conveyance of the property, and she afterwards refuses to do so, in consequence of which the purchaser throws up the transaction, the facts make out a *prima facie* case in favor of the claim for commissions: *Hamlin v. Schulte* (Minn.), 27 N. W. Rep., 301, *Clapp v. Hughes*, 1 Phila. (Pa.), 382.

If the sale falls through in consequence of the refusal of the purchaser to perform his contract, without any default on the part of the vendor, the broker is not entitled to commissions, for he has not produced a purchaser: *Hyams v. Miller*, 71 Ga., 608; *Parmly v. Head*, 33 Ill. App., 134; *Yeager v. Kelsey* (Minn.), 49 N. W. Rep., 199; *Garcelon v. Tibbett*, 24 Atl. Rep., 797. And if the failure to effect a sale or exchange is due to the misrepresentations of the other party, which lead the principal to refuse to go on with the transaction, the broker cannot recover: *Rockwell v. Newton*, 44 Conn., 333.

When the broker has commenced negotiations with a prospective purchaser, the owner cannot save his commissions by taking the matter out of the broker's hands, and completing the transaction himself, especially when the broker has a reasonable time in which to make the sale: *Lane v. Albright*, 49 Ind., 275; *Keys v. Johnson*, 68 Pa., 42; *Briggs v. Boyd*, 56 N. Y., 289; *Doonan v. Ives*, 73 Ga., 295; nor can he sell to others during the

time he has allowed the parties introduced by the broker to decide, and so defeat the broker's claim: *Reed v. Reed*, 82 Pa., 420. Notwithstanding a revocation of his authority, the broker is entitled to commissions, if the revocation was made with a view to defeat his right to them: *Heaton v. Edwards*, 51 N. W. Rep., 544; *Smith v. Anderson* (Idaho), 21 Pac. Rep., 412; *Knox v. Parker* (Wash.), 25 Pac. Rep., 909; *Blumenthall v. Goodall* (Cal.), 26 Pac. Rep., 906; and the revocation of the authority of an agent, without notice to a validly appointed sub-agent, will not affect the rights of the latter: *Lamson v. Sims*, 48 N. Y. Super. Ct., 281.

If the owner changes the terms of the sale, and the sale consequently falls through, the broker has a valid claim: *Gorman v. Scholte*, 13 Daly (N. Y.), 516. The same is true when the owner ignores the agent, and sells to the parties, with whom the latter has been negotiating, on terms different from those on which he was authorized to sell: *Reynolds v. Tompkins*, 23 W. Va., 229; *Dailey v. Young*, 13 N. Y. Suppl., 435; *Plant v. Thompson*, 42 Kans., 664, S. C. 22, Pac. Rep. 726; *McConaughy v. Mahammah*, 28 Ill. App., 169; *Levy v. Coogan*, 9 N. Y. Suppl., 534. "If vendors were permitted to employ brokers to look up purchasers, and call the attention of buyers to the property which they desired to sell, limiting them as to terms of sale, and then, while such purchasers were negotiating, take the matter into their own hands, avail themselves of the services and expenses of the broker in bringing the property in the market, and effect a sale by an abatement in the price, and yet refuse to

pay the broker anything, the business of a broker would not be worth pursuing; gross injustice would be done; every unfair and illiberal vendor would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers, who were, in reality, procured by the efforts of the agent:" *Chilton v. Butler*, 1 E. D. Smith, 151. Where the owner sells at a reduced price, however, the broker is not entitled to commissions on the original price, but on the actual selling price: *Martin v. Silliman*, 53 N. Y., 615; *Lawrence v. Atwood*, 1 Ill. App., 217; *Stewart v. Mather*, 32 Wis., 344; *Jones v. Adler*, 34 Md., 440; *Richards v. Jackson*, 31 Md., 250; *Lincoln v. McClatchie*, 36 Conn., 136; *Nesbit v. Helsar*, 49 Mo., 383.

If the defendant, however, has acted in good faith in revoking the agent's authority, or changing the terms of sale, or if he concludes the transaction in ignorance of the fact that the purchaser has previously been in negotiation with the agents, he will not be liable to the latter for commissions: *Cathcart v. Bacon* (Minn.), 49 N. W. Rep., 331; *Blodgett v. Sioux City*, etc., R. R., 63 Iowa, 606.

When the broker is not in fault, a bare refusal by the vendor to accept the purchaser tendered him, will not defeat his right to commissions: *Harwood v. Diemer*, 41 Mo. App., 48; *Monroe v. Snow* (Ill.), 23 N. E. Rep., 401; *Greenwood v. Burton* (Neb.), 44 N. W. Rep., 28. And when the owner will not sign an agreement to sell, required by the purchaser, it is tantamount to a refusal to sell: *Neilson v. Lee*, 60 Cal., 555. If the owner, knowing

that a part of the land he has placed in the broker's hands belongs to a railroad company, refuses to sell unless paid for that, the broker is entitled to commissions: *Cawker v. Apple*, 15 Col., 141; S. C., 25 Pac. Rep., 181.

Any other device to evade payment of commissions is equally ineffectual. If, by the agreement of sale, the vendor is to furnish a perfect abstract of title, and he fraudulently procures a rejection of the title for the purpose of defeating the sale, the broker is still entitled: *Phelps v. Prusch*, 83 Cal., 626; S. C., 23 Pac. Rep., 1111. Commissions are due if, pending the transaction, the owner gives the land in question to his son, and the son finally consummates it under the father's directions: *Fox v. Byrnes*, 52 N. Y. Super. Ct., 150. If a contract of sale, not in writing, is broken by the vendor, he cannot set up the invalidity of the contract as a defence to an action by the broker for his commissions: *McFarland v. Tillard* (Ind.), 28 N. E. Rep., 229.

When it is agreed that no commission shall be due until the property is paid for, and the testimony shows that a judgment was obtained by notes taken for the property, and that the vendor released the judgment, extended the time of payment thereof for several years, and assured the agent that his commissions were fully earned and payable, it will support the recovery of the commissions: *C. Aultman & Co. v. Ritter*, 51 N. W. Rep., 569.

VI. When several brokers are employed to sell the same piece of land, with notice of each other's employment, a sale, by any one of them, works an immediate revoca-

tion of the authority of the others; all agreements to sell, made by them, are made at the risk of such revocation; and a subsequent production of a purchaser will not entitle them to commissions: *Ahern v. Baker* (Minn.), 24 N. W. Rep., 341; *Goldsmith v. Cook*, 14 N. Y. Suppl., 878; *Francis v. Eddy*, 52 N. W. Rep., 42. If the employment of another agent is not known to a broker, however, he is entitled, if he produce a purchaser before he receives notice of a previous sale: *Fox v. Rouse*, 47 Mich., 558.

VII. Whether the employment of the agent be exclusive or not, the principal still has the right to sell on his own account, the only limitations being that he must not sell to one with whom the agent is negotiating, and must give him notice of his own sale: *McClave v. Paine*, 49 N. Y., 561; *Wylie v. Marine Nat'l Bank*, 61 N. Y. 415; *Lloyd v. Matthews*, 51 N. Y., 125; *Stewart v. Murray*, 92 Ind., 543; *Hungerford v. Hicks*, 39 Conn., 259; *Dolan v. Scanlary*, 57 Cal., 261; *Hill v. Jebb*, 18 S. W. Rep., 1,047; *Learned v. McCoy*, 30 N. E. Rep., 717; *Dole v. Sherwood*, 41 Minn., 535; S. C., 43 N. W. Rep., 569. To establish his claim in the latter case, however, the agent must prove that he had a purchaser for the property: *Waterman v. Boltinghouse*, 82 Cal., 659; S. C., 23, Pac. Rep., 195. But a broker, who, only three or four days after his employment, procures a purchaser ready, able and willing to buy at the owner's price and terms, is entitled to his commissions. Although the land was sold by the owners on the very day it was put into the broker's hands, no notice having been given him until he informed the owners of his sale. "It is

true the defendants had the right to sell the property themselves, as they did, and that the sale, rightfully made by them, necessarily prevented the completion of the subsequent sale, put on foot by plaintiffs; but it by no means follows that plaintiffs were thereby deprived of their right to compensation. When defendants sold their property, it became their duty to notify plaintiffs of that fact, and until that was done, the contract relation between them continued. After defendants sold their property, they remained silent as to the fact of sale, at their peril, so far as the plaintiffs were concerned. It would be unjust to permit the agent to go on in the work of his principal until he has accomplished all he was employed to do, and then tell him, when the labor was done and expense incurred, that he should receive no compensation, because the principal, though without notice to him, had, by other means, attained the desired end": *Woodall v. Foster* (Tenn.), 18 S. W. Rep., 241. See *Lane v. Albright*, 49 Ind., 275.

VIII. The broker must act with perfect good faith toward his principal. Any fraudulent misrepresentation or concealment will destroy his right to commissions: *Segar v. Parrish*, 20 Gratt (Va.) 672; *Vennum v. Gregory*, 21 Iowa, 326; *Coleman v. Meade*, 13 Bush. (Ky.) 358; see *Collins v. McClurg* (Col.) 29 Pac. Rep., 299. Where the purchaser agreed to pay the stipulated price if the broker would endeavor to persuade the vendor to take less, and conceal the agreement from him, it was held bad faith on the part of the broker: *Pratt v. Patterson*, 112 Pa., 475. Such action will also entitle the

vendor to refuse a subsequent offer to take the property on his terms: *Martin v. Bliss*, 10 N. Y., Suppl., 886. But misrepresentations, not made with fraudulent intent, which do not mislead the vendor, or as to the truth of which he is in a position to judge, will not affect the broker's rights: *Irwin v. Mowbray*, 5 N. Y. Suppl., 430; *Coe v. Ware*, 40 Minn., 404; S. C., 42 N. W. Rep., 205. So an agreement between real estate brokers and one of three purchasers to divide their commissions with him, concealed from the other purchasers and from the vendor, does not deprive the brokers of their right to commissions, where it does not appear to have prejudiced the vendor: *Chase v. Veal*, 18 S. W. Rep., 597.

IX. As a general rule, a broker cannot recover commissions from both parties to a transaction, on the ground that "no man can serve two masters," and that such action must necessarily make him less eager for the interests of his immediate employer: *Ingraham v. Horne* (Ill.) 16 N. E. Rep., 868; *Armstrong v. O'Brien*, 19 S. W. Rep., 268; *Carroll v. O'Shea*, 18 N. Y. Suppl., 146, unless he can show that the fact of his double employment was known to both parties: *Frankel v. Wathen*, 12 N. Y. Suppl., 591; *Kronenberger v. Fricke*, 22 Ill. App., 550; *Collins v. Fowler*, 8 Mo. App., 588; *Rowe v. Stevens*, 53 N. Y., 621. He must show that his own principal was fully aware of his employment by the other party: *Bonwell v. Howes*, 1 N. Y. Suppl., 435; *Condit v. Sill*, 18 N. Y. Suppl., 97; *Jarvis v. Schaefer*, 105 N. Y., 289; *De Steiger v. Hollington*, 17 Mo. App., 382, or he will forfeit all claims to commissions from him: *Everhart v. Searle*,

71 Pa., 256; *Smith v. Townshend*, 109 Mass., 500. One, however, who in making an exchange of property merely brings the parties together, they making their own contract, can recover commissions from both: *Orton v. Scofield*, 61 Wis., 382; see *Green v. Robertson*, 64 Cal., 75, *contra*; *Bates v. Copeland*, 4 MacArthur (D. C.) 50.

X. If the broker is acting in violation of a law or ordinance which requires the payment of a license before he can engage in the brokerage business, he cannot recover commissions on sales effected by him: *Johnson v. Hulings*, 103 Pa., 498; *Stevenson v. Ewing* (Tenn.) 9 S. W. Rep., 230; *Angell v. Van Schaick* (N. Y.) 30 N. E. Rep., 395; *Buckley v. Humason*, 52 N. W. Rep., 385.

XI. If the amount of commissions or compensations is specially provided for in the agreement with the broker, that of course governs; but when the amount is undetermined, the broker is entitled to a reasonable compensation, unless there is no evidence of his employment: *Harrell v. Zimplymery*, 66 Tex., 292; *Hollis v. Weston*, 31 N. E. Rep., 483; *Coffin v. Luixweiler*, 34 Minn., 320. This may be proved by evidence of the price generally said to a broker for such services, whether the plaintiff is a regular broker or not: *Hollis v. Weston*, *supra*. When the commissioners usually paid range from five to twenty-five per cent., and there is no evidence of any uniform custom or usage in that regard, the proper measure of compensation is the value of the services rendered: *Potts v. Aechternacht*, 93 Pa., 138. And when the evidence as to the agreed compensation is conflicting it is competent to show that the compensation claimed by the broker is

reasonable and not unusual: *Greer v. Iowa*, 18 S. W. Rep., 1038.

A broker is not entitled to commissions on a sum paid for the option to purchase, which is never exercised: *Gilder v. Davis*, 18 N. Y., Suppl., 544; but when a broker, employed without any special agreement as to payment of compensation, procures a purchaser, who defaults after payment of \$10,000, he is entitled to *pro rata* commissions: *Peters v. Anderson*, 14 S. E. Rep., 974. If the vendor agrees to allow the broker a commission on sales made by himself, he is only liable for actual sales, not for a transfer to secure debts: *Terry v. Wilson's Est.*, (Minn.) 52 N. W. Rep., 973.

When the broker procures a person with whom the principal makes a sealed contract of exchange, but informs the principal that he will charge no commission if the exchange is not consummated, the oral promise, made after performance of his original contract and without consideration, is not binding on him: *Little v. Rees*, (Minn.) 26 N. W. Rep., 7; *Bash v. Emerich*, 59 N. Y. Super. Ct., 548.

XII. A broker is entitled to commissions upon an exchange in the same manner as upon a sale; and his right thereto is governed by the same rules and is subject to the same qualifications and limitations as in the latter instance: *Hewett v. Brown*, 21 Minn., 163; *Redfield v. Tegg*, 38 N. Y., 212.

[NOTE.—Owing to lack of space, the above annotation aims chiefly to present the recent cases on the subject. The earlier ones will be found collected in the Am. and Eng. Encyc. of Law, Vol. II., pp. 578-589. and 30 Am. Law Reg., 114.]

R. D. S.

DEPARTMENT OF PRACTICE, PLEADING AND
EVIDENCE.

EDITOR-IN-CHIEF,

HON. GEORGE M. DALLAS,

Assisted by

ARDEMUS STEWART, HENRY N. SMALTZ, JOHN A. MCCARTHY.

WEST JERSEY TITLE AND GUARANTEE CO. v. BARBER
(CLERK).¹ COURT OF CHANCERY OF NEW JERSEY.

Public Records—Right to Inspect—Remedies when Access is Denied.

A corporation duly organized under the laws of New Jersey for the purpose of the examination, insurance and guaranty of the title to lands and estates, or interests in lands, in the State, and the issuing of certificates, policies, contracts and undertakings therefor, is entitled to the same right of access to and examination of the public records of the county as an individual.

When employed to examine the title to any particular piece of property, such corporation is subrogated to the right of its employer to have such access, and the fact that it contemplates making a contract of guaranty of the title to the land in question does not detract from such right of access.

When the custodian of the records of which examination is sought refuses to permit such a corporation to enjoy the right of access to them to which it is entitled by law, and such right is clearly established, the proper remedy is by injunction to prevent the custodian from interfering with the corporation in the exercise of its right. The remedy by mandamus is, in such a case at least, entirely inadequate.

Opinion by PITNEY, V. C.

THE PROPER REMEDY FOR AN INTERFERENCE WITH THE RIGHT OF
ACCESS TO PUBLIC RECORDS.

At common law there was no such right of free access to and examination of public records as now exists by statute in most of the United States. The right existed only in regard to such records as had some bearing upon a case pending (when the usual practice to obtain an examination was by motion in the cause), or where the records sought to be examined were those records of a corporation in which the cor-

porators were supposed, in the view of the law, to have a peculiar interest. (Hereford v. Bridgewater, Bunb., 269; Att.-Gen. v. City of Coventry, Bunb., 290; Herbert v. Ashburner, 1 Wils., 297.) In the latter case mandamus was held to lie, even when there was an action pending. (R. v. Tower, 4 M. & S., 162; Harrison v. Williams, 4 D. & R., 820.) And in the courts of the United States, where the right re-

¹ Reported in 24 Atl. Rep., 381.

mains still subject to some of its common-law limitations, the usual practice is by petition for leave to examine. (*Re McLean*, 9 Cent. L. J., 425 (S. C., 8 Repr., 813); *Re Chambers*, 44 Fed., 786.)

But which is the proper remedy under the statutes which give the right of free access to all public records to any citizen, irrespective of any interest he may have in them? Is it mandamus to compel the custodian of the records to allow the relator the free exercise of his right, or injunction to prevent him from interfering with that right? The principal case declares that injunction is the only adequate remedy; but an examination of the cases will show that the weight of practice, if not of positive authority, is overwhelmingly in favor of the procedure by mandamus. The latter was the form of action adopted in *Fleming v. Clerk*, 30 N. J. L., 280; *State v. Williams*, 41 N. J. L., 332; *Peo. v. Cornell*, 47 Barb. (N. Y.), 329; *Peo. v. Reilly*, 38 Hun. (N. Y.), 429; *Peo. v. Richards*, 99 N. Y., 620 (S. C., 1 N. E. Rep., 258); *Webber v. Townley*, 43 Mich., 534; *Diamond Match Co. v. Powers*, 51 Mich. 145; *Burton v. Tuite*, 78 Mich., 363; *Aitcheson v. Huebner*, 51 N. W., 634; *Hawes v. White*, 66 Me., 305; *Bean v. Peo.*, 7 Col., 200; *Stockman v. Brooks* (Col.), 29 Pac., 746; *Phelan v. State*, 76 Ala., 49; *Randolph v. State*, 82 Ala., 527; *State v. Rachac*, 37 Minn., 372; *State v. Meadows*, 1 Kans. 90; *Cormack v. Wolcott*, 37 Kans. 391; *Boylan v. Warren*, 39 Kans., 301; *Comm. v. O'Donnel*, 12 W. N. C., 291. It is true that in many of these cases the decision was against the right of the relator to exercise the right of examination claimed; but in none of them, ex-

cept in *Diamond Match Co. v. Powers*, was it even hinted that the complainant had made a mistake in the form of his action. Indeed, in two instances, *Hawes v. White* and *Stockman v. Brooks*, it was expressly asserted that mandamus was the proper remedy, without, however, entering into any discussion of the question, or giving any reason for that assertion. On the other hand, very few cases attempt to assert the right of examination by bill and injunction; and in but one of these is it explicitly asserted that such is the proper remedy, the others either refusing the injunction, or allowing it without any discussion on that head. *Buck v. Collins*, 51 Ga., 391; *Scribner v. Chase*, 27 Ill. App., 36; *Belt v. Abstract Co.*, 20 Atl., 982; *West Jersey Title & Guarantee Co. v. Barber* (the principal case), 24 Atl., 381.

It seems clear that as far as results only are concerned, it makes no practical difference which form of action is adopted; for in either case the result is the same. If the complainant proceeds by mandamus, he obtains a decree commanding the respondent to permit him to exercise his right of examination of the records; if he proceeds by bill and injunction, he obtains a decree commanding the defendant to abstain from any interference with him in the exercise of that right; thus in either case guaranteeing to him the free and undisturbed exercise of it. The deciding point, then, must be the nature of the right which is sought to be enforced; whether it is one which is more properly enforced by mandamus, or by injunction.

The essential distinction between mandamus and injunction is thus laid down in *High on Extraordi-*

nary Legal Remedies, 2d Ed. (1884), sec. 6, p. 10: "An injunction is essentially a preventive remedy, mandamus a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction, those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative or preventive one. And since mandamus is in no sense a preventive remedy, it cannot take the place of an injunction, and will not be employed to restrain or prevent an improper interference with the rights of relators." So, too, an injunction is the proper remedy where the injury is such "as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented." Hilliard on Inj., sec. 31, p. 20. In general, "it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process." High on Inj., 2d Ed., sec. 1, p. 3. The interference of the Court by injunction "rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented." Wait, Act. & Def., Vol. 3, p. 687.

In order to warrant the issuing of an injunction, then, the complainant must have a clear right which is injuriously affected by the acts of the defendant; and if the right be not clear, he will be sent to law to establish his right. The same is true of mandamus: Wait, Act. & Def., Vol. IV, p. 376; but that being a proceeding at law, is an eminently proper method of establishing a questioned right. It is worthy of note that a large majority of the cases in which mandamus was invoked to assert the right to the examination of public records were cases of first impression, or cases in which the right claimed did not exist; and it may be that this fact had some influence in determining the form of action. But where the right is clear, there are certain advantages peculiar to the process by injunction which that by mandamus does not possess.

In the first place, as quoted above, mandamus is used to redress past grievances, injunction to prevent future injury. In the class of cases under discussion, then, when the injury complained of is a single refusal to permit the complainant to examine the records at a particular time, and there is no claim that he has any desire to examine them at the present or any future time, and consequently no likelihood that the injury may be repeated, there would seem to be good reason for holding that mandamus is the proper remedy, the injury being past. In such a case the process by mandamus would permit the relator to examine the records for the purpose in his mind at the time when the examination was denied him; but would not afford him any assurance that the right would not

be denied him at any future time when he might again have occasion to examine them. In other words, it would be entirely in the power of the custodian of the records to refuse the relator access to them at each and every time when he should wish to examine them, and he would be put to the trouble of a new writ for each such invasion of his right. In point of fact, this was done in one case, that of *Burton v. Tuite*, 80 Mich., 218, and although the Court got over the difficulty by calling in the doctrine of contempt, yet there are reasons which would lead one to doubt the propriety of such an exercise of the strong arm of the Court. If the order was for a single examination, the officer would hardly be in contempt for refusing a second; and if the order was to permit any and all examinations, it is not quite clear how such an order could be made with propriety when one refusal only had been complained of. It would seem, then, far preferable to use the extraordinary powers of the Court in the first place by way of injunction, which would properly cover all instances; and contempt could then be predicated with propriety of any violation of the injunction decree.

In the second place, the cause of action in such cases is rather for interference with a right, than for the establishment or enforcement of a right; and in such a case the proper remedy is by injunction to prevent such interference.

In the third place, the remedy by mandamus is wholly inadequate to redress a continuing grievance, for the simple reason, as has been seen above, that the writ only applies to past grievances, and for every successive invasion of the complain-

ant's rights he is obliged to sue out a new writ; provided, of course, that the respondent is contumacious. And while there is authority for the view that redress can be had by process for contempt, yet it may be very plausibly argued that the exigency of the writ is answered by permission for a single examination, and that it is then exhausted. This, too, would seem to be the correct inference from the nature of the writ. But in the case of injunction no such argument could be urged; for then the command of the writ would be to abstain from all interference with the complainant in the exercise of his right of examination, and its exigency would not be exhausted during life, or the continuance of the defendant in office.

Finally, the Court will not grant a mandamus unless convinced that it will be practically effective to secure the object aimed at: *Shortt, Inf. Mand. & Quo. War.*, p. 246. And there are strong reasons for believing that mandamus would not be an efficient, or perhaps too efficient, remedy in many cases. When the right claimed is one that would require the use of the office of the custodian for many days, so as to be likely to interfere with the duties of the office, or with the rights of others of the public, mandamus would simply command the officer to permit the relator to exercise his right, without regard to the rights of others, or the paramount claims of the public business, and the courts would have no power, in adjudicating the bald question of right, to annex to that right the necessary restrictions. This very argument was one of the reasons for refusing the writ in several of the cases; and while it

cannot avail to defeat the right when it exists, supposing that mandamus is the proper remedy, it should nevertheless be one of the potent factors in settling the question whether or not it is the proper remedy. In granting an injunction, however, the Court can annex to it all proper and necessary qualifications of the exercise of the right interfered with, and *uno flatu* settle all the conflicting interests and rights of the officer, the public and the complainant.

These reasons are very fully and clearly stated in the two cases which have condescended to discuss the question, where it would seem that the courts arrived at their conclusions independently of each other. At all events, the earlier case is not referred to in the latter. The former case, however, *Diamond Match Co. v. Powers*, 51 Mich., 145, went off on other grounds, but the discussion of the present question is very interesting and instructive. "It seems evident that in any case where the claim is for a continuous use of the record office and its public contents from day to day and week to week, and not merely for a single occasion, with all its material facts defined, there must be great, if not insuperable difficulty in enforcing the claim by mandamus. The register has rights and duties which must be respected; so the general public have rights as well as the claimant; and the conditions are not steadily the same. They are subject to variation. On every occasion each must act reasonably, and with proper regard for the rights and duties of the others. As the circumstances vary the conduct must vary, so as to secure conformance to the rule of reasonable action by

which the right is to be regulated. When the case presents a single occasion, and calls for an act which is presently determinate, it is entirely practicable to direct the act by mandamus. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile."

The advantages of the procedure by injunction are even more forcibly pointed out in the opinion of the Vice-chancellor in *West Jersey Title & Guarantee Co. v. Barber*, 24 Atl., 381 (the principal case): "With regard to the remedy by *mandamus* it seems to me that the slightest consideration will show that it is entirely inadequate. If the complainant has the right which it claims to have access to the books and records in defendant's office, it is one which, from the nature of the business, is a continuing one, and may arise every day, and one which, to be of any value, must be exercised at once. To delay its exercise until it could be determined by a court of law would be simply to deny it, because, before the judgment could be obtained, the value of its exercise in the particular instance complained of would be lost. If, indeed, the right of the complainant here in question is not so clearly established at law as to warrant the interference of this Court by the strong arm of an injunction, that alone is a sufficient answer to the complainant's case, and the

complainant will be, as a matter of course, turned over to a court of law, to establish there its right by a test case; but when that is once established, it would be a denial of justice to say that, in every instance that it is desired to exercise the right already clearly established, it must resort to its legal remedy, and can have no help from this Court. If, then, the complainant's right is clear at law and not open to question, it seems to me that it is entitled to the aid of this Court to enjoin the defendant from preventing its exercise."

These arguments are certainly entitled to careful consideration; and a close examination will find but little that can be urged against them. It may be safely concluded, then, that whenever the right of examination claimed is not for a single instance, but for a continu-

ous period of time, whether long or short, the proper remedy is by injunction; and that the remedy by mandamus in cases of this nature is confined to those instances in which a single exercise only of the right is claimed; or, to give this discussion a concrete value, that the proper remedy for any interference with the right of examination by a private individual, searching the records for his own private purposes or curiosity, would be by mandamus; but the remedy for an interference with the right of examination by an abstractor of titles or a title insurance company, whose business naturally calls for constant and even daily investigation of the records, would, on account of its continuous nature, be by injunction.

ARDEMUS STEWART.

EARLY v. COMMONWEALTH.¹ SUPREME COURT OF APPEALS OF VIRGINIA.

Confessions—When Deemed to be Voluntary.

On the trial of an indictment for arson, evidence was offered by the prosecution to prove certain confessions made by the accused to a private detective, employed to work up the case, who arrested him. The accused testified that the detective said "that if he would tell him all about it he would make it easier for him." *Held:* affirming the Court below, that the evidence was admissible, as, taking the accused's testimony as true, the inducement was not offered by a person in authority.

LEWIS, P.

ABSTRACT FROM THE OPINION OF THE COURT.

The objection is to the action of the Court in admitting evidence to prove certain confessions by the prisoner. The evidence was objected to on the ground that the confession was not voluntary. The confession was made to the wit-

¹ 11 S. E. Rep., 795.

ness, Hale, who testified that it was made, so far as he knew, without any inducement having been offered by any one. The witness also testified that he was informed by Wren, a detective, who had been employed by the corporation of Rocky Mount to ferret out evidence of the burning, that the prisoner desired to make a confession to him (the witness); that, accompanied by Wren, he went to the prisoner and had a conversation with him; that in the course of that conversation Wren stated to the prisoner that, if he made any statement at all, it must be with the understanding that it was freely and voluntarily made, without the influence of hope or fear, and that thereupon the confession was made. The prisoner, however, upon this point, testified that before the conversation just alluded to Wren said to him that if he would "tell him all about it he would make the Commonwealth make it easier" on him, and that in consequence of this assurance he made the confession in question. On the other hand, one Edwards, another detective, testified that before Wren spoke to Hale on the subject of the proposed confession, he heard a conversation between Wren and the prisoner, in which Wren remarked to the prisoner that, if he wanted to make any statement to him, he could not offer him anything, but that his statement must be voluntary. This, he says, he heard, although he did not hear all that passed between them. Wren, it appears, was discharged as a witness by the attorney for the Commonwealth before the trial, and did not testify. We are of opinion that, under these circumstances, the confession was admissible in evidence. There is no doubt but that, before a confession can be rightly admitted, the Court must be satisfied that it was voluntary—that is, that it was made without the influence of hope or fear exerted by a person in authority, or with the apparent sanction of such person; and the burden of showing that it was voluntary is upon the Commonwealth. But here, taking the prisoner's own statement to be true, no inducement was offered by any one in authority.

THE ADMISSIBILITY OF CONFESSIONS AS EVIDENCE.

I. *The Test of Admissibility.*—

The admissibility of confessions as evidence in criminal prosecutions depends upon the credibility given them by the circumstances under which they were made. They have value as evidence only when freely and voluntarily made, when they are presumed to flow from a conscience overburdened with a sense of guilt, and are therefore admitted as a proof of the crime to which they refer. It is to be presumed that a man will not of his free will impute to himself a crime of which he is innocent, but the law recognizes the susceptibility of human nature to the violent influences of pain or danger, or the hope of escape therefrom, and, ever seeking the truth, guards jealously against the causes which may produce a false confession. 4 Bl. Com., 357; Foster's Crown Law, 243; Joy on Confessions, *12; Simon's Case, 6 C. & P., 541; In the People v. McMahon, 15 N. Y., 384; SELDEN, J., states clearly a principle which should be noted. "The first distinction which the law makes is between a statement or declaration made before, and one after the accused was conscious of being charged or suspected with the crime. If before, it is admissible in all cases, whether made under oath or without oath, upon a judicial proceeding, or otherwise; but if made *afterward*, the law becomes at once cautious and hesitating. The inquiry then is, is it voluntary,—does it proceed from the spontaneous suggestions of the party's own mind, free from the influence of any extraneous disturbing cause?"

II. *The Presumption as to the**Admissibility of a Confession.*—

The determination of the question of admissibility is of course the province of the judge. The rule as to the presumption which obtains when the confession is first offered in evidence, in England, uniformly is that the confession was involuntary, and the burden of proving the contrary is upon the prosecution. Thus, in *R. v. Warringham*, 2 Den. C. C., 447, Parke, B., said, "You are bound to satisfy *me* that the confession which you seek to use against the prisoner was not obtained by improper means." In the United States, the rule varies. *Young v. State*, 68 Ala., 569; *Nicholson v. State*, 38 Md., 140; *People v. State*, 49 Cal., 69; *Barnes v. State*, 36 Tex., 356; *Thompson v. Comm.*, 20 Gratt. (Va.), 724; and *People v. Swetland*, 77 Mich., 61, follow the English rule. In other cases, the confession is presumed to be voluntary, but the defendant is protected by his privilege of objection to its introduction. *Comm. v. Culver*, 126 Mass., 464; *Comm. v. Sego*, 125 Mass., 210; *Reefer v. State*, 25 Ohio St., 464; *State v. Davis*, 34 La. An., 351; *O'Mahoney v. Belmont et al.*, 62 N. Y., 117.

The rules laid down by Sir James Stephen in his Digest of the Law of Evidence for determining the admissibility, or voluntary nature of confessions are as follows:

"No confession is deemed to be voluntary,

(a) if it appears to the judge to have been caused by any inducement, threat or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether

addressed to him directly or brought to his knowledge indirectly;

(b) if (in the opinion of the judge), such inducement, threat or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

(c) A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority."

II. *Inducements which Render a Confession Involuntary and Inadmissible.*—Leaving for future consideration the question of who is a person in authority within the meaning of the rule, we will consider what inducements are regarded as sufficient to render a confession given in consequence thereof inadmissible. The decisions are not uniform, and the same lack of unanimity characterizes the decisions on every branch of the subject. In 3 Russell on Crimes, 368, it is laid down that a confession, in order to be admissible must be "free and voluntary," that is, it must not be extracted by "any sort of threat or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." "The law cannot measure the force of the influence used, or decide its effect upon the mind of the prisoner, and, therefore, excludes the declaration if any degree of influence has been exerted." EYRE, C. J., in Warickshall's Case, 1 Leach C. C., 263, gives the reason

for the rule, saying, "a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and, therefore, it is rejected. In a note to this case, a case illustrative of the reason is given. One of three men, tried and convicted of the murder of one H., confessed himself guilty, under a promise of pardon. The confession, therefore, was not given in evidence against him, and a few years afterward it appeared that H. was alive. In the earlier cases the Courts appear to have been astute to seize upon anything that by any possibility could be considered to have influenced the defendant to confess.

In *Rex v. Drew*, 8 Car. & P., 140, the prisoner was told "not to say anything against himself, as what he said would be taken down and used for or against him at his trial," and in *Reg. v. Farley*, 1 Cox, 76, the prisoner was told by a policeman, that whatever she told him would be used against her on her trial. This last case was decided on the authority of *Rex v. Drew*, holding that to assure the prisoner that whatever she said would be used at her trial, was holding out to her an advantage which rendered her statement inadmissible. *Regina v. Harris*, 1 Cox, 166, was decided similarly.

In *Reg. v. Jones*, MAULE, J., said: "To tell a prisoner what he says *will* be given in evidence against him is an inducement, for if he is told that it is to be used at all, it may induce him to say something that he may suppose may make for him." These cases were cited and overruled in *Reg. v.*

Baltry, 2 D. C. C., 430 (1852), where the policeman, having the defendant in custody, told him the nature of the charge against him, and said: "You need not say anything to criminate yourself, but what you do say will be taken down and used in evidence against you." POLLOCK, C. B., deciding in favor of the admission of the statement, said: "The words employed by the constable amount neither to a promise or a threat. They are to be taken in their obvious meaning, and when a confession is well proved, it is the best evidence that can be produced; unless it is clear that there was a threat or a promise to induce the confession, it should be admitted." This case marked the aversion, which had long been growing, with which the judges had come to regard the exclusion of valuable evidence for reasons of little weight. In *Comm. v. Whittemore*, 11 Gray, 202; *Comm. v. Sego*, 125 Mass., 210; *Rex v. Jarvis*, L. R., 1 C. C. R., 96. However, where it was said that it "would be better" to confess, this was held to be a promise of worldly advantage, which would exclude the confession. *Rex v. Kington*, 4 C. & P., 387; *Rex v. Dunn*, 4 C. & P., 543; *Rex v. Slaughter*, 4 C. & P., 353; *Rex v. Walkely*, 6 C. & P., 175; *Rex v. Thomas*, 6 C. & P., 353; *Comm. v. Kennedy*, 135 Mass., 543; *Kelley v. State*, 72 Ala., 244; *State v. Wintzgröde*, 9 Or., 153; *State v. Alphonse*, 34 La. Ann., 9; *Vaughan v. Comm.*, 17 Gratt. Va., 576; *People v. Thompson*, 84 Cal., 598; *Comm. v. Hannan*, 4 Pa. St., 269; *State v. York*, 37 N. H., 175. On the other hand, it has been held that such words would not render confessions inadmissible. *Reg. v. Parker*, Leigh & Cave, 42; *Fonts v.*

State, 8 Ohio, N. S., 98; *Aaron v. State*, 37 Ala., 106; *Young v. Comm.*, 8 Bush, 366; *State v. Freeman*, 12 Ind., 100; *State v. Whitfield*, 70 N. C., 356.

Mere admonitions to tell the truth have been held sufficient to exclude. *R. v. Holmes*, 1 C. & K., 248; *R. v. Upchuck*, 1 Mos. C. C., 465; *State v. Hagan*, 54 Mo., 192, 70 N. C., 356; *R. v. Fennell*, 72 B. D., 147; *R. v. Mansfield*, 14 Cox C. C., 639. But the sounder doctrine undoubtedly is that a mere adjuration to speak the truth will not exclude where there were no threats or promises. *Whart. Cr. Ev.*, Sec. 647, 652, 654; *Aaron v. State*, 37 Ala., 106; *King v. State*, 40 Ala., 314; *Kelly v. State*, 72 Ala., 244. And in *R. v. Jarvis*, L. R., 1 C. C. R., 96; *R. v. Sleeman*, 1 Dears. C. C., 249; *R. v. Reeve*, L. R., 1 C. C., 362, it is held that where the words used only import advice on moral grounds, the statement made in consequence were admissible, and that the cases to the contrary have gone too far.

Promises of favor or assistance will exclude, *Cass's Case*, 1 Leach, 293; or a hope of pardon, *Comm. v. Knapp*, 9 Pick., 497; a release "if he would tell." *Mountain v. State*, 40 Ala., 344; or in hope of being admitted as a witness for the prosecution. *Spears v. State*, 2 O. St., 583; *State v. Johnson*, 30 La. An., P. II, 881.

A promise of a collateral benefit is not an inducement sufficient to render a confession inadmissible. 1 *Greenl. Ev.*, Sec. 229. Thus, in *Rex v. Lloyd*, 6 C. & P., 353, where the constable told the prisoner that if he would tell he could see his wife, who was confined in a separate room, the statement following was admissible.

State v. Tatso, 50 Vt., 48; *Rutherford v. Comm.*, 2 Metc. Ky., 387; *State v. Wentworth*, 37 N. H., 196. In *Rex v. Sexton*, 3 Russ. C. & M., 368, a confession made after the prisoner's request for a glass of gin had been granted, was held inadmissible. The correctness of this decision has been seriously doubted. The inducement offered must be of a strictly temporal advantage. Thus, exhortations by the chaplain of the jail, appealing to the prisoner to ease his soul by a confession, will not render such confession inadmissible. *R. v. Gilham*, 1 Mo. C. C., 186. So, the remark, "an honest confession is good for the soul." 9 Lea. Tenn., 128.

For the purposes of this note a further discussion of inducements and their effect is unnecessary. They are fully treated of in Wharton's *Crim. Law*; Greenl. Ev., and Am. and Eng. Encyl. of Law.

IV. *Who is a person in authority?*

The rule as given by Stephen indicates that an inducement must be offered by a person in authority in order to vitiate the confession, and that an inducement offered by one not in authority will have no effect. This is accepted both in England and the United States; but it may be profitable to seek to ascertain what is requisite to constitute a person in authority within the meaning of the rule.

As in the question of inducements, the courts were more liberal in the earlier cases in construing the effect of the status of the person offering the inducement upon the mind of the accused. In more than one case it was seriously doubted whether anything beyond the terms and effect of the inducement, *per se*, should be considered,

and in *Rex v. Dunn*, 4 C. & P., 543, BOSANQUET, J., said, "Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person." This, while it was a departure from established principle as laid down in the cases of *Rex v. Hardwick*, *Rex v. Gibbons*, 1 C. & P., 97, and *Rex v. Tyler*, 1 C. & P., 129, was followed in *Rex v. Slaughter*, 4 C. & P., 544, note; and in other cases, at least rendered the admissibility of the evidence a dubious question. Thus, while a prisoner was in custody, he was told by a person without authority that it would be better for him to confess, and he thereupon made a statement. PARKE, B., said: "There is a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement is held out by that person, is receivable in evidence: *Rex v. Spencer*, 7 C. & P., 302; *Rex v. Pountney*, 7 C. & P., 302. But in Taylor's case, 8 C. & P., 733, it was held that a confession must have been induced by a person in authority in order to repel the presumption of its truth: *Rex v. Hardwick*, *Rex v. Gibbons*, and *Rex v. Tyler*, *supra*. And in *Reg. v. Moore*, 2 Den. C. C., 527, it was declared that a confession is admissible though obtained by threats and inducements, provided such threats and inducements were held out by a person not in authority. Also, where the inducement is held out in the *presence* of one in authority, it is presumed to have been with his sanction, and, therefore, inadmissible. Thus, where the inducement was held out by the magistrate's clerk, in the presence of the magistrate: *Drew's case*, 8

C. & P., 140; *Moody's case*, 2 Crawf. & Dix C. C.; *Rex v. Laugher*, 2 C. & K., 225; *Rex v. Kingston*, 4 C. & P., 387; *Cohen v. Kennedy*, 135 Mass., 543; *U. S. v. Chapman*, 4 Am. L. J. (N. S.), 440.

In *Jones v. State*, 58 Miss., 349, the sheriff went with W., a stranger to the prosecution, to the jail, and while there was told by the cell-mate of the defendant that he, the defendant, wished to make a confession, as his father told him it would be better for him to tell the truth. The sheriff, with W., saw the man, and told him that his confession could not benefit him. W. then said that it "would be better to tell the truth," and the man made a statement. *Held*, that the sheriff could not be presumed to have sanctioned the inducement offered by W., as he had just before told the prisoner that his confession could not benefit him.

STEPHEN says that "the prosecutor, officers of justice having the prisoner in custody, magistrates and other persons in similar positions are persons in authority. The master of the prisoner is not such a person in authority if the crime of which the person making the confession is accused was not committed against him." This is also the general rule in the United States: *People v. Ward*, 15 Wend., 231; *Wolf v. Comm.* 30 Gratt., 833; *State v. Brockmann*, 46 Mo., 566; *Rector v. Comm.* 80 Ky., 468; *U. S. v. Pocklington*, 2 Cr. C. C., 293; *State v. Staley*, 14 Minn., 105. In *Russ on Crimes*, it is said that all engaged in the apprehension, prosecution or examination of the prisoner are persons in authority within the meaning of the rule: *Smith v. Comm.* 10 Gratt., 734; *Wolf v. Comm. supra*.

In some of the States a much broader rule has been laid down. Thus in *Murphy v. State*, 63 Ala. 1 (1879), the Court said: "A confession induced by hope or fear, excited in the mind by the representations of any one connected with the prosecution, or connected with the accused, who may, considering his relations and condition, *be fairly supposed by him to have power* to secure him whatever of benefit is promised, or to influence the threatened injury, cannot be regarded as voluntary and ought not to be received as evidence. This view was approved in *People v. Walcott*, 51 Mich., 612 (1883), where three persons, none of whom were in a position of authority, gained admission to the cell of the accused in the dead of night and secured a confession by representing that it would be "better to tell the truth." In sharp contrast to the decision of the Michigan court is the decision in *Comm. v. Cuffee*, 108 Mass., 285 (1871), where the confession of a boy of thirteen, arrested without a warrant and upon suspicion, elicited from him by two police officers who questioned him for two hours, after searching him and stripping him, and without warning him of his right not to answer, or giving him an opportunity to consult counsel, was held admissible on his trial for the crime. In this case the reason the Court gave was that there were no threats or promises made by the officers which would induce the prisoner to confess. *Commonwealth v. Nott*, 135 Mass., 269, is more orthodox, where an inducement held out in the presence of a superior officer renders the ensuing statement inadmissible. But the Massachusetts courts seem in a number of cases

to have disregarded the rule of exclusion whenever its technicalities were not met by the case in hand: *Comm. v. Tuckerman*, 10 Gray, 173; *Comm. v. Smith*, 119 Mass., 305; *Comm. v. Cuffee*, *supra*. The cases in the Federal courts, while adhering to the letter of the rule, do not go beyond it or disregard it to such an extent as the courts of Massachusetts.

The true note was sounded in the case of *Murphy v. State* (63 Ala., 1, 1879), where the Court defines a person in authority to be "any one connected with the prosecution, or connected with the accused, who may, considering his relations and condition, be *fairly supposed by him* to have power to secure him whatever benefit is promised, or to influence the threatened injury."

In the principal case, the case of *U. S. v. Stone* is relied upon as deciding that a detective, who is employed by the owners of stolen goods to find them and to institute civil or criminal proceedings regarding the same, is not a person in authority whose inducements will prevent a confession inadmissible in evidence. There is a slight distinction, however, between the facts of *Stone's* case and the subject of annotation. In the first, at the

time the inducements (which were slight) were made, no process had issued against the defendant, nor had any criminal proceedings been instituted. In the principal case, according to the hypothesis of the judge, "if what the defendant says is true," the inducements were held out *after* the defendant was under arrest, when all confessions are regarded suspiciously. How far we can go before we are beyond the pale of those who are "engaged in the prosecution or apprehension of a prisoner" it is difficult to say, but the impression of the detective upon the prisoner's mind must have been that of a person clothed with authority, and the inducements held out were more than sufficient. Rules cannot be formulated which can meet the necessities of every case. Age, condition, situation, character and attending circumstances must always enter into the problem. Certainly, from the trend of decisions, it appears that the old fear, that the rule of exclusion has been carried too far, and "in its application justice and common sense have too frequently been sacrificed at the shrine of mercy," still exists in the breasts of the judiciary.

HENRY N. SMALTZ.

EDITORIAL NOTES.

INJUNCTIONS TO RESTRAIN LIBELS, AND COURTS OF CRIMINAL EQUITY.

AMONG the Abstracts of Cases which appeared in last month's issue was one decided by Judge BEATTY, United States District Judge for Idaho. The case, which was determined on the 11th of last July, was that of the Cœur d'Alene Consolidated and Mining Company *v.* Miners' Union of Wardner,¹ and grew out of trouble between the company and its men consequent on a strike. The miners were more or less riotous; so much so, in fact, that the Governor on June 4 issued a proclamation stating "that there now exists in the county of Shoshone, State of Idaho, combinations of men confederating and conspiring for unlawful purposes . . . such combinations are preventing by force the owners of mines from working and developing the same, and from employing the persons of their choice." It is also, we believe, beyond dispute that the strikers were not only in possession of the mine for some time, but that they removed the new employees from their work and carried them to the borders of Montana, thus practically drumming them out of the State, and that at the time the legal proceedings were commenced the mine owners were practically unable, because of the actions and threats of the strikers, to run their mines or employ new men. Setting forth this state of things, the company came into the District Court asking that an injunction might be issued restraining the members of the union from further interfering, threatening or molesting its employees or entering its works. The Court granted the injunction.

This is not the first time that the powers of a Court of

¹ Reported in 51 Fed. Rep., 260. See AMER. LAW REG. AND REV., Vol. 31, p. 710

Equity have been used to prevent crime where property is threatened. In the case of the New York, Lake Erie and Western R. R. Co. *v.* Wenger,¹ Judge STONE issued an injunction restraining the ex-employees of a railroad company from going on the property of the company for the purpose of preventing freight cars from being moved by non-union hands. Perhaps the most important case is one in Massachusetts, where members of a union on strike were prevented by injunction from intimidating the new workmen by making a demonstration in front of the shop with banners bearing such inscriptions as: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U."² Judge ALLEN says:³ "The act of displaying banners with devices, as means of threats and intimidation to prevent persons from entering into or continuing in employment of plaintiffs, was injurious to the plaintiffs and illegal by common law and by statute."⁴ We think the plaintiffs are not restricted to their remedy by an action at law, but are entitled to their relief by injunction." There is also a case in the Circuit Court for the Southern District of Ohio where the acts on the part of the members of a union, which were enjoined, consisted in attempting to "boycott" a publisher for refusing to unionize his office, by calling on the advertisers in his paper and threatening to withdraw their patronage, and persuade others to follow suit, if they continued to advertise in the paper.⁵ Thus Judge BEATTY, District Judge of Idaho, had authority and precedent for his assertion that, "when the attempt to injure consists of acts or words which will operate to intimidate and prevent the customers of a party from dealing with, or

¹ 17 Wk. Law. Bul. (Ohio), 306 (1887), Cuyahoga County Court of Common Pleas.

² Sherry *v.* Perkins, *et. al.*, 147 Mass., 212 (1888).

³ p. 214.

⁴ Citing Pub. Sts. (Mass.), c. 74, Sec. 2; Walker *v.* Cronin, 107 Mass., 585.

⁵ Casey *v.* Cincinnati Typographical Union No. 3, *et. al.*, 45 Fed. Rep., 135 (1891).

laborers working for him, the courts have with nearly equal unanimity interposed by injunction."¹

With nearly equal unanimity the American courts have held that an injunction cannot be granted to restrain a libel. Though the courts have made many practical exceptions,² the main principle is constantly reiterated. Where property is not affected by the libel, of course there is no question that the Court of Equity has no jurisdiction.³ But even where property and business is affected by the act, if at the same time it is a libel, it will not be enjoined by a Court of Chancery.⁴ There are two reasons given for this refusal to grant an injunction where a libel is concerned. One is that it would interfere with that clause in all our constitutions which protects the liberty of speech and the press. The other and far more important reason is, that it would interfere with the jurisdiction of juries over questions of libel and slander. We, therefore, have this curious result: You can restrain a crime when a crime injures property, but you cannot restrain a libel though a libel injures property. Surely a jury trial is just as important to one accused of crime as to one sued for libel. What is the reason for this apparent contradiction? We think investigation will show that it rests more on the accident of history than on logic or legal principles.

The rise and progress of the power of the Court of Chancery to issue injunctions is one of the most interesting, as it is the most instructive, of legal historical studies. It is the history, as are all other powers of Chancery, of the development of law by men who had a stronger sense of justice between man and man than desire to preserve

¹ The qualification might have referred to *Richter Bros. v. The Journey-men Tailors Union*, 24 Wk. Law Bul. (Ohio), 189 (1890), Franklin County Common Pleas: We might say with absolute unanimity, however, because in that case no intimidation or threats were alleged, and this is the only case which would throw any doubt on such an assertion.

² See *infra*, 796.

³ *The New York Juvenile Guardian Society v. Roosevelt*, 7 Daly (N. Y.), 188 (1877).

⁴ *Brandreth v. Lance*, 8 Paige (N. Y. Ch.), 24 (1839); *Richter Bros. v. Journeymen Tailors Union*, *supra*.

individual liberty. This was the evil result of the separation of equity and the common law, and the consequent independent development of equity as a preventive of wrong, and the common law as a punishment for wrong. The equity lawyers, disregarding the method by which wrong should be punished, were, in their efforts to prevent wrong, constantly trampling on the love of liberty implanted in the heart of the Anglo-Saxon, which led him to regard with jealous care the prerogative of a freeman to have his guilt judged by a jury of his peers. Thus the Star Chamber, which has been aptly described as a Court of Criminal Equity, spent its time in issuing orders to persons forbidding them to commit crime. The popular feeling against the Court was based, not so much on the fact that "many new-fangled crimes were invented," as on the objection to the summary manner in which those charged with contempt of the Court's orders were convicted.

In one direction, however, the minds of the English people were deeply impressed by the Star Chamber's invention of crimes. So many publications were enjoined and public men protected from criticism by injunctions restraining so-called libelous publications and those which expressed opinions, that free speech rapidly became a thing of the past. And so deeply impressed were the people with the necessity of preserving the freedom of the press that impeachment threatened any Lord Chancellor who thereafter had the temerity to restrain a libel by injunction. In fact the issuance of such an injunction by the notorious SCROGGS was one of the grounds of his impeachment by the House of Commons.¹ And even as late as 1810, when Lord ELLENBOROUGH remarked at the trial of one who had destroyed a publicly-exhibited and indecent picture, which libeled the defendant's sister and brother-in-law, that, "upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition;"² we are

¹ State Trials (1680), Vol. 8, p. 197.

² *Du Bost v. Beresford* 2 Camb., p. 512.

informed that the remark "excited great astonishment in the minds of all the practitioners of the Courts of Equity."¹ Until 1868, in England, as in America, the formula that equity will not restrain a libel was constantly in the mouths of the Chancellors. But as in America there has been no hesitation in restraining threatened crimes, provided they also injured property, which it is the peculiar province of the Courts of Equity to protect. Thus Vice-Chancellor MALINS, in *Springhead Spinning Co. v. Riley*,² issued an injunction restraining the members of a union on strike from placarding the town with posters asking workmen not to work for their old employer, because he thought these posters were part of a scheme to *intimidate* others, and not simply to *persuade* persons from seeking to take their places. And though the particular application of the rule has been doubted, the principle on which the case rests has never been questioned. In fact it has been distinctly made the basis of the principal American cases above quoted. Property was in danger, and the strong instinct on the part of the equity lawyer is to protect property. The consideration that by making a crime a contempt of court he was treading on the province of juries did not impress him as it did in the case of a libel, because historically the Star Chamber had not created crimes which were not crimes, as they had turned writings which were expressions of opinion and not libels into libels. It is true that no Chancellor ever pretended that he had any jurisdiction to restrain crimes as such. Such an assumption would show as mistaken conception of equity and as criminal disregard of individual rights as was exhibited by the framers of the Iowa legislation, which gives to a Court of Equity power to restrain the selling of liquor as a nuisance and to punish the act of Selling as a contempt.³ Where a crime will

¹ One of Howell's Notes in 20 State Trials (issued in 1816), p. 799.

² L. R., 6 Eq., 551 (1868).

³ See criticism of Mr. McMurtrie; Art. in Vol. 31 AMERICAN LAW REGISTER AND REVIEW, p. 1, "Equity Jurisdiction as Applied to Crimes and Misdemeanors."

affect property, because it is a crime, has not been to the Equity judges a sufficient reason why they should not interfere by injunction; but, except by one judge, the mere fact that an act injures property, is said not to be sufficient to warrant an injunction if the act is also a libel. However, if we examine the growth of the numerous exceptions to this last statement, we will find, in spite of the inherited prejudice against such injunctions, the chancellors' instinct to protect property is slowly rendering "meaningless where property is involved" the statement that equity will not restrain a libel.

The first class of exceptions to the rule that equity will not restrain a libel, is to be found in a case decided in 1742,¹ where Lord HARDWICKE restrained the publication of matter tending to prejudice the minds of the public against the case of suitors in his Court. The justice and wisdom of such an injunction has never been doubted.

The second class of cases is exemplified by the case of *Gee v. Pritchard*,² where Lord ELDON restrained the publication of letters not belonging to him who published them; thus laying down the rule, that the fact that a document contains a libel on B., cannot be used as an excuse for publishing it by A., if on account of its having belonged to B., he would otherwise have no right to publish it if it did not contain a libel. Although Lord ELDON himself questioned the case on the ground that one cannot be said to have property in letters written by another person, the particular documents restrained, and seems only to have followed the decision of his predecessors on this point with reluctance, no one has doubted the property of the rule.³

¹ Reprinted in 2 Atk., 469.

² 2 Sw. 402 (1818).

³ See remarks of Lord ELDON, p. 441. The cases and authorities referred to by Lord ELDON in support of the theory that there is a property in letters, are *Pope v. Earl*, 2 Atl., 342 (1741); the language in *Thompson v. Stanhope*, Amb., 739; *Forrester v. Waller*, a case decided in 1741, and cited in *Millar v. Taylor*, 4 Burr., 2340 (1769); cited also in 2 Bro., P. C., p. 138, where under the head of injunctions for printing unpublished M.SS. without licence are mentioned several cases between 1732 and 1768.

The third exception established is that where one asserts that his goods are the goods of another, or does anything which would lead buyers to suppose that such is the case, the injured party is entitled to an injunction. This cannot always be said in strictness to be the case of a libel. Where the goods sold are better than his whose goods they are represented to be, there is no libel. The libel only occurs where the goods are inferior. At first, however, the jurisdiction to issue an injunction in such a case was denied. Thus, in *Martin v. Wright*,¹ Vice-Chancellor SHADWELL dismissed a motion to restrain one from exhibiting for money, a picture, purporting to be a picture of the plaintiff's, whereby he claimed his own sales, were diminished.² However, in *Knott v. Morgan*,³ an injunction was granted to restrain the defendant from running an omnibus, having upon it names and words which formed a colorable combination of the names and words on the omnibusses of the plaintiff. Thus, advertisements calculated to induce the public to believe that the work sold was the work of a rival publisher, have been restrained.⁴ Disparagement of another's product, in your own advertisement, is legitimate; but the statement that what you sell is not your own, but the product of the labor of another and rival producer, is wrong. It is on this ground that the Court interferes to prevent one from copying the trade-marks of another.⁵

Following *Martin v. Wright* came the case of *Clark v.*

¹ 6 Sim., 297 (1833).

² The ground of the denial is not clear. There is some doubt whether the defendant exhibited the picture as a painting by the plaintiff. He exhibited it as a diorama, and certainly the plaintiff was not in the "diorama exhibition business." Had he been, it is said the injunction would have been granted. Citing *Page v. Townsend*, 5 Sim., 395 (1832), a case not directly in point. The Court seems, therefore, to have regarded the case as that of a man's attempting to sell something as another's, which that other never sold; and, therefore, property or business, was not injured. It may, however, be injured. (See *infra* next par.).

³ 2 Keen, 213 (1836).

⁴ *Seeley v. Fisher*, 11 Sim., 581 (1841); see also *Lord Byron v. Johnson*, 2 Mer., 29 (1816).

⁵ *Croft v. Day*, 7 Beav., 84 (1843).

Freeman,¹ which seems to have decided that where one sells his products as the products of another, the other is not entitled to an injunction, no matter how much his business may be indirectly injured, if he does not, himself, produce similar articles. I say it seems as if this was the principle enunciated; though, as its predecessor, *Martin v. Wright*, it is not easy to see the exact grounds of the decision. Sir James Clarke, the plaintiff, was a celebrated specialist in consumption. Of course, he never was interested in selling quack medicine, and he attempted, by injunction, to restrain the defendant, a druggist, from selling pills, entitled "*Sir James Clarke's Consumption Pills*." The Master of the Rolls, Lord LANSDALE doubts whether the eminent physician has been injured in his ability to gain a livelihood, but he does not leave the reader certain whether he would have still refused the injunction had this not been the case. Had Dr. Clark been a pill vendor, he says the Court would have granted the injunction.² Afterwards it was doubted whether the injunction should not have been issued on the ground that the physician had a property in his name.³ But it seems to us that the question of property in the name is not in point, but rather, if protection of property is the basis of an injunction, was his property injured or his ability to gain property impaired by the continued and wrongful act of the defendants?

The next class of cases in which an exception is made to the rule that equity will not restrain a libel, is that an injunction will be granted to restrain one from using the name of another in such a way that the other will be exposed to civil liabilities, or in other words, render him liable to lose his property. Thus in *Routh v. Webster*⁴ the provisional directors of a joint stock company having, without the authority of the plaintiff, published a prospectus stating him to be a trustee of the company, they were restrained

¹ 11 Beav., 112 (1848).

² p. 119.

³ Remarks of Lord Cairns in *Maxwell v. Hogg*, L.R., 2 Ch. App., p. 310, (1867).

⁴ 10 Beav., 561 (1847).

by an injunction. Here we can point out that the difference between this case and that of Sir JAMES CLARK'S, assuming that the physician had his reputation injured by the pills, seems to us to be immaterial. In one, the ability to gain property is impaired, in the other, loss of property is threatened. A distinction which would enable a court of equity to stretch forth its arm and ward off threatened danger to property, but render it powerless to protect the means of acquiring property is too chimerical long to be tolerated.

The next and last exception arises in relation to property in patents, and is similar to the rule, that an injunction will be granted to prevent one threatening another man's employees or customers. You cannot go about asserting another's patent is invalid, and an infringement of your own patent, and saying you intend to bring suit against those who sell your rival's goods, provided it is evident you have no such intention.¹

All these cases, however, were treated simply as exceptions to the general rule that a libel cannot be restrained in equity even though it injures property or the means of acquiring property.²

Yet a rule of law which would permit an injunction when the injury to a man's ability to acquire or keep property by falsely saying a ware is of his manufacture when it is not, and yet which would not allow such an injunction when the injury resulted from a false statement of fact concerning his business or occupation, is neither founded in logic or common sense. This was clearly seen by MALINS, Vice-Chancellor, in the much abused case of *Dixon v. Holden*.³ A published a notice, which was false, that B was a partner in a bankrupt firm. B was well known as a partner in another and solvent firm, and his ability to ac-

¹ *Rollins v. Hinks*, L. R., 13 Eq., 355 (1872.) This case was not decided until after the case of *Dixon v. Holden*, but the rule of law enunciated is now recognized in America, where *Dixon v. Holden* has always been repudiated. (See *infra* 767).

² See remarks by Lord Chancellor COTTENHAM, in *Fleming v. Newton* 1 H. L. C., 363, 377 (1848).

³ L. R. 7 Eq., 480 (1869).

quire a living would be obviously impaired by the wide publication of the false statement. The injunction was granted, on the broad ground that the Court of Equity has jurisdiction to restrain the publication of any document tending to the destruction of the property of the plaintiff, even though the publication of the document is at the same time a libel. The Vice-Chancellor has been criticised 'on both sides of the Atlantic'¹ for introducing an entirely new rule of law, whereas we cannot but think that the exceptions to the doctrine of libel already existing, and which have been pointed out, would have to be abandoned, or else the general principle, as recognized by the Vice Chancellor, would have to be adopted; viz., that whenever property is threatened by the publication of a document, the fact that it is a libel will not prevent its publication from being restrained by injunction. The adoption of this principle, for which Vice-Chancellor MALINS contended, would have the effect of putting libels and crimes, with respect to injunctions, on the same footing. Where an act involving a libel or a crime threatened property, it would be restrained; not because the act was a libel or a crime, but rather in spite of its being a crime or libel, and because it threatened property. And, indeed, as the same reason, why an injunction should not be granted, namely, the interference with the province of the jury, obtains in both a crime and libel, and the same reason, viz., the protection of property, urges the Court to grant an injunction, it seems but right that both should stand or fall together. And yet, as we have said, the decisions of Judge MALINS has been severely criticised on both sides of the Atlantic; while in England, in the case of *Prudential Ass. Co. v. Knott*,² the Vice-Chancellor's decision was expressly overruled. This last case was an attempt to restrain the publication of a book purporting to make a false statement about the business methods and financial standing of the company,

¹ *Mulkern v. Ward*, 13 Eq., 619 (1872), and cases *infra*; *Kidd v. Horry*, 28 Fed. Rep., 773 (1886), *infra* 767.

² 10 Ch. App., 142 (1875).

plaintiff seeking the injunction. The Court did not consider whether the statements were true or false, or whether they would injure the property of the company, but contented themselves with denying their jurisdiction.

There is some doubt whether *Dixon v. Holden*, or *Prudential Ass. Co. v. Knott* expresses the law on the sub-

NOTE a.

Mr. Justice BRADLEY, in *Kidd v. Horry*,¹ thought that legislation in England had now established the rule of *Dixon v. Holden*, as opposed to the rule of the latter case of *Prudential Ins. Co. v. Knott*, and in support of this view he cites Acts of Parliament and recent English decisions. In this view we are compelled to believe the late learned jurist was mistaken, though he was undoubtedly correct in assuming that what was done in *Dixon v. Holden*, *i.e.*, restrain a libel by injunction, where it affected property, is done every day by English Courts. The principle enunciated by Vice-Chancellor MALVINS in *Dixon v. Holden*, however, has never been adopted by any other judge. In view of Mr. Justice BRADLEY's opinion, it may be of interest to point out how with the completed result has been accomplished.

In 1854 Parliament passed the Common Law Procedure Act, the seventy-ninth section of which runs as follows: "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may in like case or manner as heretofore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract of like kind arising out of the same contract, or relating to the same property or right."² A reference to the subject of mandamus³ shows that the Court could issue the injunction only at the conclusion of an action. This defect was cured by a subsequent section,⁴ and it was provided that a writ of injunction could issue at any time after the commencement of an action, proper security being offered. It may be assumed that this Act did not extend by one iota the power of injunctions out of Chancery, and the jurisdictions to issue injunctions by the Common Law Courts was confined to two cases: First, where an action had been commenced to prevent the repetition of the injury complained of before the matter was determined, and, second, to prevent the repetition of an injury after a jury had determined that the act was an injury. While limited, however, an injunction could issue under the circumstances above mentioned to restrain a libel trespass or any other act.⁵ This was the state of the law at the time of *Nixon v. Holden*, and it was also probably the state of the law at the time of arguing the case of *Prudential Ins. Co. v. Knott*, which was decided

¹ 28 Fed. Rep., 773 (1886).

² 17 & 18 Vict. chapter 125, § 79, p. 442.

³ Id. §§ 68-72.

⁴ Id. § 82.

⁵ *Saxby v. Esterbrook*, L. R. 3 C. P. D., 339 (1878); *Shaw et al. Earl of Jersey* L. R., 4 C. P. D., 120 (1879).

ject as it exists in England to-day, the question having been complicated and obscured by legislation. Leaving the explanation of the effect of this legislation and the present condition of the law in England to a note,^a we will pass on

January 20, 1875, but on the 2d day of November, 1874, the Supreme Court of Judicature Act went into effect. This Act, after consolidating the several Courts into the High Court of Justice, proceeds in one of its clauses as follows: "A mandamus or injunction may be granted, or a receiver appointed by an *interlocutory order* of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." It resulted from this section that any Court sitting as a Court of Equity could restrain, until the final hearing of an action, any act which they saw fit.¹ It is evident that the Act gave the Court of Equity the power to issue an injunction as an interlocutory order whenever they thought proper. They could, therefore, on an interlocutory application restrain a libel. And if a suit was brought for damages on account of a libel, at the same time the plaintiff could apply for a temporary injunction restraining further publication, and on the termination of the suit in his favor, could secure a permanent injunction against the repetition of the injury. But the Acts did not give to Courts of Chancery any new power to grant injunctions in a simple application for an *injunction*, not as an accompaniment of a suit or a proceeding in the Courts of Chancery. On an application for an injunction it would not be granted to-day, if it could not be granted before the Acts. The case of *Day v. Brownrigg*² shows that there was no difference in the principle on which a court grants injunctions made by the *Judicature Act*. The case of the *Prudential Ass. Co. v. Knott* has never been overruled. The cases which have been supposed by the judiciary of this country to overrule that decision are totally distinct. The mistake on the part of American Bench and Bar arises from the language of the *Syllabus* in *Thorley's Cattle Food Co. v. Massam*³ and also from the language of Vice-Chancellor MALINS.

The Court of Chancery had just decided that the goods of the two contending parties were made from the same receipt, and that neither had an exclusive right to the process.⁴ The Vice-Chancellor decided that after that decision had been made, he would entertain, and if proper issue an injunction restraining one party from asserting that his was the only true article, and all others were imitations. The Vice-Chancellor only

¹ 36 & 37 Vict., ch. 66, § 25, sub. 8: L. R. 8. State 321.

² *Beddow v. Beddow*, L. R., 9 Ch., Div. 89 (1878).

³ L. R. 10 Ch., Div. 294 (1878).

⁴ L. R., 6 Ch., Div. 582 (1877).

⁵ *Massam v. J. W. Thorley's Cattle Food Co.*, L. R. 6 Ch. Div., 574 (1877). This decision in as far as the court determined the products were made from the same receipt was confirmed, but in other respects it was reversed. *Massam v. Thorley's Cattle Food Co.*, L. R. 14, Ch. Div., 748 (1880).

to our American exceptions to the rule that a libel cannot be restrained in equity.

Of course there is no doubt but that where literary or other property exists in the publications, though it also happens to be a libel, it will be restrained, or that one will be restrained who sells his own goods as the goods of another,

refused the injunction because the need for it was not clearly made out. In other words a right had been determined by a court and an injunction was asked to restrain its violation. It would have been perhaps a stretch of the Act to issue the injunction, provided we assume that such an injunction could not issue before the Act. However, the power to issue the injunction was certainly given by the spirit of the Judiciary Act if not by the letter. The spirit of that Act and the Act of 1854 being to enable a court of law which had once determined that the acts of one party were any injury to another to prevent their repetition. And, therefore, when in 1880 the Court of Appeals had stated it, as its opinion also, that the two products were made from the same receipt,¹ and one party still continued to send round advertisements falsely stating that they only held the true receipt, Vice-Chancellor MALINS issued a permanent injunction restraining the further publication of the advertisements making the false statements, and this action on his part was upheld by the Court of Appeals.²

The two other cases cited by American judges as proving that the English courts have repudiated *in toto* the old doctrine that equity will not interfere to restrain the publication of a libel, are Quartz Hill Consolidated Gold Mining Co. v. Beall,³ and Loog v. Bean.⁴ But on inspection we find that they are both cases of an interlocutory injunction pending the hearing of the case on the merits, and in the first, as a matter of fact, the injunction was refused. In the second case the injunction was granted.

We are forced, therefore, to the opinion that the late Mr. Justice BRADLEY was mistaken, when he says: that the Prudential Life Ins. Co. v. Knott, has been overruled in England, and the rule of Vice-Chancellor MALINS, in Dixon v. Holden, that where property was injured though by a libel, equity would interfere by injunction, has been adopted in consequence of the Common Law Procedure Act of 1854, and the Judicature Act of 1873. Practically, it is true, a man, as a consequence of these Acts, can always have a libel restrained by injunction. He can bring his action, procure a temporary injunction, and then, if the case is decided in his favor, a permanent injunction. Consequently, we may never have the question of Dixon v. Holden, or Prudential Ins. Co. v. Knott, raised in an English Court, and which case would be followed will always remain a debatable question.

¹ Massam v. Thorley's Cattle Food Co., L. R., 14 Ch., Div. 748

² Thorley's Cattle Food Co. v. Massam, L. R., 14 Ch. Div., 763, (1880).

³ L. R., 20 Ch. Div., 501 (1882).

⁴ L. R., 26 Ch. Div., 306 (1884).

though on account of the goods sold being of inferior quality there may be a libel in the representation. And, although we do not find any case on the subject, we cannot but believe that courts which would restrain a man from hurting another's business by selling inferior goods as the goods of that other, would also restrain him from selling goods in another's name, which, on account of their character, hurt that other's business, thereby depriving him of the means of acquiring property.

The jurisdiction to restrain one man from threatening to sue the customers of another who sell articles which he alleged are infringements of a patent held by him, where it is shown that he has no such intention, was until lately in doubt. Thus Mr. Justice BRADLEY, in *Kidd v. Horry*,¹ denied his power to issue an injunction to restrain the defendants from threatening to sue the purchasers of a rival patented article, though it does not appear whether the threat was *bona fide* or not. However, he criticises a New York case,² where the threat was not *bona fide* and where the injunction had been issued, and it is fair to presume that he would have denied his right to issue the injunction, even if it had been shown that there did not exist on the part of the defendant any intention to sue the customers of the plaintiff. Judge CARPENTER, of the Circuit Court for the District of Massachusetts, in *Balto. Car Wheel Co. v. Bemies*,³ followed Mr. Justice BRADLEY, but when the case of a man threatening to sue another's customers for infringement of patent, when he had no intention of doing so, came fairly before a Federal Court, the injunction was granted.⁴ Our Courts, however, still repudiate their power to issue an injunction to restrain false statements concerning another's business, whether those statements are assertions that a patent is invalid,⁵ or that trade-marks are being in-

¹ 28 Fed. Rep., 773 (1886).

² P. 776, the case of *Croft v. Richardson*, 59 How Pr., 356 (1880).

³ 29 Fed. Rep., 95 (1886).

⁴ *Emack v. Kane* (C. Court N. D., Ill.), 34 Fed. Rep., 46 (1888).

⁵ *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass., 69 (1873).

fringed,¹ or that a company is insolvent,² that a manufacturer employ's "scab" labor,³ statements about a man's life tending to injure his business,⁴ or a false statement that Company A and not Company B has received a prize at a State fair.⁵

We do not wish, for a moment, to be considered as contending that an injunction should have been issued in all these cases, but simply to point out that there is no valid reason why an act, which injures property, should not be restrained, although it is also a libel, when an act, which is a crime, is restrained if it injures property. All acts, which injure property, are not restrained in equity. The jurisdiction of the Court is limited to cases where, unless it interfered, irreparable injury to the property would result. Why in such case the protecting power of the Court should be withheld simply because the act which injures consists in words is not clear to the writer. It is true, the liberty of the press is sacred. Let us hope it will always remain so; but it is the liberty to express and write freely our opinion. The liberty which would allow a man to ruin beyond repair the property of his neighbor, by circulating false statements of facts, is the liberty of anarchy, and not of civilized society. Surely an action which can prevent the unlawful injury to property is to be commended. The liberties of a people are not threatened by injunctions seeking to prevent unlawful acts, but by the trial of the fact, whether the act forbidden has been committed, by a judge, *ex parte*, and without a jury. This is a real danger, but it will not be averted by allowing injunctions to issue to restrain crimes and not libels. Such a position being illogical will result in one of two results equally to be deplored—either the practice

¹ Manger Agt. Dick., 55 How. (N. Y. Pr.), 132 (1878).

² Life Assn. v. Boogher, 3 Mo. App., 173 (1876).

³ Richter Bros. v. The Journeymen Tailors' Union, 24 Wk. Bul. (Ohio Com. Pleas, Franklin Co.), 189, (1890).

⁴ Brandreth v. Lance, 8 Paige (N. Y. Ch.), 24 (1839).

⁵ The Singer Mfg. Co. v. Domestic Sewing Machine Co., 49 Ga., 70 (1872).

of issuing injunctions to restrain crimes where they also injure property will be abandoned, and a useful function of the Court lost, or the practice being continued, acts, which really amount to a crime, will be tried by a judge without a jury.¹ This state of facts it seems to us would warrant the interference of a Legislature, to harmonize the principles of equity with the safe guards which the common law as hedged around the conviction and punishment for crime. Had the two systems been developed from the beginning by the same men, an injunction would have probably been issued, whenever irreparable damage to property was threatened, but the fact whether the injunction had been disregarded, if the act also amounted to a crime or a libel, would, at the request of the accused, be submitted to a jury. Why not adopt this method now? By doing so, the beneficial workings of an injunction would be retained, and yet crimes and libels would still be within the province of juries.

W. D. L.

WITH this number THE AMERICAN LAW REGISTER AND REVIEW presents to its readers the first installment of the annotations written and edited in pursuance of the plan outlined in the August number of this periodical. The plan, briefly stated, contemplates the publication of about sixty annotations a year upon important cases recently decided by the courts. These cases and the annotations appended to them deal with problems drawn from various branches of the law, and they are selected in such a way as to lay before our readers briefs upon constantly recurring questions of great importance to the lawyer in the active practice of his profession. Each of the departments into which the field of law has been divided is presided over by an eminent specialist who will super-

¹ The case of *U. S. v. Kane*, 23 Fed. Rep., 748 (1885), while the course of Justice BREWER was perfectly consistent with precedent, is an example of crimes being condemned by a judge without a verdict of a jury. The case has a "false ring" in the ears of an Anglo-Saxon, and serves as a warning as to what may happen if one is charged with disregarding injunctions restraining crime.

wise the work of his assistants and edit every annotation that appears. The assistants themselves are lawyers in active practice at the bars of the largest cities of Union, whose services we have been able to secure by reason of their particular interest in the branch of law upon which their work will be done.

By a reference to the annotations, which appear elsewhere, it will be seen that in all cases where a mere syllabus is a sufficient presentation of the case, no more extended statement of the facts is made, and in no case will opinions be printed in full. But in some instance (as, for example, in the case of *Mullen v. Doyle*) the purpose of the annotation cannot be accomplished without a brief statement of facts and a short abstract of the opinion of the Court. In such cases it has been thought well to preserve the usual form of case-reporting, including the insertion of the names of counsel.

It must not to be forgotten that it is part of this annotation scheme to publish from time to time monographs upon legal topics of great interest and importance, each monograph being the work of an assistant in the department to which the subject of the monograph belongs. These monographs will be published in book form by the University of Pennsylvania Press, and it is fair to predict for the rest of the series a large sale, which has been realized in the case of the three monographs already issued.

It is hoped that the readers of the *AMERICAN LAW REGISTER AND REVIEW* will appreciate the importance of an enterprise which furnishes to them, in convenient and accessible form, sixty elaborate briefs in a single year, fresh from the pens of lawyers whose especial attention is given to the subject of which they treat and prepared under the eye of those than whom none are more eminent in the branch of law over which they preside. G. W. P.

BOOK REVIEWS.

By W. D. L.

A TREATISE ON THE LAWS REGULATING THE MANUFACTURE AND SALE OF INTOXICATING LIQUORS. By HENRY CAMPBELL BLACK, West Publishing Company, St. Paul, Minn., 1892.

This is the first treatise dealing with the subject of intoxicating liquors. In fact, as Mr. BLACK tells us, the widespread application of legal principles to "liquor cases" is of recent date, over one half of the cases cited in the volume having been decided within the last decade. The author further tells us that his constant aim has been to make a thoroughly practical treatise—"a useful tool for the working lawyer." The result is a book of over 700 pages, including a good index. The plan of stating the subject of a paragraph at its commencement is a useful aid to the eye, but why the publishers should have disfigured the pages by printing these headings in heavy black letters we fail to perceive. There is much that commends itself to us in Mr. BLACK'S work; the citations are numerous, the language is excellent, and the whole work shows care and thought. Yet there is borne in on us constantly the thought that the author has undertaken a task the thorough and satisfactory performance of which is impossible, for the reason that to do so would involve writing a complete legal treatise on all branches of the law. There are divisions of a subject which sometimes ought not to be divided. To write a book which shall treat of all branches of law which can ever at any time affect liquors, is to mix together an infinite variety of subjects. This mode, however, is apparently popular with publishers. Next we will have a legal treatise on "Dogs," setting forth the right of property in dogs, the dog-catching laws and registering laws, cruelty to dogs and how to bring indictments under the dog laws. Such a book would be on a level with the work before us. It treats of the "constitutionality of

the liquor laws," of their "effect on contracts and rights of action," of "civil damage laws," by which is meant the laws giving to a wife or child a right of action against one who has intoxicated her husband or father. Then we have a chapter on "Injunction and Abatement of Liquor Nuisances," followed by a threefold division of crimes under the Liquor Acts, and winding up with a disquisition on "Indictments, Procedure and Evidence." Thus Constitutional, Substantive and Remedial law, Contracts, Torts, Crimes, are jumbled together in confusion. Nor can one complain or wonder if each of these various subjects, seen from a liquor standpoint, appears rather hazy in the reading. Our only amazement is that Mr. BLACK was able to make any clear statement at all, discussing so many branches of the law at once and looking at each from such a narrow point of view. That repetition should constantly occur is inevitable. For instance, in order to deal with the constitutionality of the liquor laws, it is necessary to attempt to explain the "Theory of the Police Power." Under this head, in Section 29, he speaks of the "Regulation of Commerce." This same subject, which is properly a sub-head of Chapter III, "Constitutionality of Liquor Laws," is dealt with in a separate chapter called "Liquor Legislation and the Regulation of Commerce," while under the title "Prohibition," in Chapter V, we have another account of the same subject. This only goes to prove that one who would write on the constitutionality of a liquor law must do so from the standpoint of constitutional law and not merely examine the cases involving liquor in the Supreme Court of the United States. We cannot explain, however, why the author should treat of the "Constitutionality of the Search and Seizure Laws" in Paragraph 32 and again in Paragraph 351.

The only trouble with the book, however, is the fundamental one. From minor defects, as we have pointed out, it is comparatively free. It is the intense desire to produce something practical, a "lawyer's tool," which carried to the extreme defeats its own end. A legal publisher

argues somewhat in this fashion: "Liquor is the cause of a great many prosecutions; there are a great many liquor laws being made every day. A treatise on liquor is, therefore, a practical treatise. It will not be a theoretical classic like a work on equity, or contracts, or procedure, or indictment." In this argument, however, it is forgotten that the working lawyer must know the principles of contracts, of procedure and indictment, and that the law has not been created for the sole purpose of settling disputes in which liquor or any other similar commodity may be involved; that there is not a law of liquor as distinguished from all other laws. And thus we venture to predict that one who attempts to gain a working knowledge of all but one of the subjects treated in the work before us would fail of his purpose no matter how closely he read the text. A work on the abuse of intoxicating liquors treated as a crime would be of use, provided it left untouched the subject of indictments and constitutional law. We would then have a treatise on a statutory crime. Thus Chapter I, on the definition and construction of terms used in liquor laws; and Chapters XVI, XVII and XVIII, dealing with crimes and offenses under the liquor laws, are of substantial value. The rest of the work is valueless to the very person for whom it was written—the working lawyer. If any publisher or textbook writer thinks he could argue on the subject of what is a sufficient indictment under the liquor laws, or on the constitutionality of a liquor law, with only the preparation which a study of the chapters on this subject in Mr. BLACK'S book would give, he is greatly mistaken. In fact, concerning the rest of the work, besides the chapters we have mentioned, we can only regret that so much time and conscientious, painstaking effort have been expended in attempting to accomplish the impossible.

LEADING CASES UPON THE LAW OF TORTS. Selected by GEORGE CHASE, LL.B., Professor of Law in the New York Law School. West Publishing Co., St. Paul, Minn., 1892.

The title of this work is somewhat misleading. The term "Leading Case" conveys to the mind a case which

has been the first to enunciate principles now universally recognized. The cases selected by Mr. CHASE are, as he himself says: "Object lessons, showing the application of principles." As such, the cases given have been selected, not for their historical value, but for the clearness with which they have applied long settled rules of law to particular facts. Hence the volume comprises modern cases to a large extent. As a work of this kind, it is one of the best we have seen. Each case is prefaced by a statement of the principal of law the application of which is illustrated. A report of the case follows, with syllabus, statement of the case and opinion of the court in full. In many cases the syllabi, etc., are taken from the West Publishing Company's reporter system. The size of the book and double column is also taken from those reports. The latter feature, while detracting greatly from the appearance of the page, makes it much easier for the eye, though the close printing is to be regretted. We think it was a mistake to print the opinion in full when part does not relate to the subject of torts. For instance, on page 4, a column is devoted to a discussion on the law in England relative to ancient lights, and on page 9, Judge MORTON entertains us with a disquisition on the question whether the plaintiff is an insolvent. All this has nothing to do with torts, and might with advantage have been omitted. Apart, however, from these trifling defects, the work as prefixed by an analysis of the rules of law illustrated, and supplemented by a full index of the syllabi of the reported cases, is a complete illustration of the law of torts as it exists to-day. The work is primarily intended for students, but lawyers desiring to look up a point of law, without thumbing over big digests and searching for the reports of cases cited, will find their labor considerably lightened by keeping a volume of Mr. CHASE'S "Selected Cases" in their library. In fact we are compelled to admit that the value of such a work to the practicing lawyer far exceeds its educational value. Some of those engaged in legal instruction believe that the way to teach law is to state a principle and then show its application to facts. To

all such a work like the present as a schoolroom tool will find ready favor. For our part, however, and taking our own experience as a guide, we believe that the principles of law are best understood by a review of those cases which illustrate the development of principles. Believing this, AMES'S "Cases on Torts" appeal to the student side of us much more than the present volume. We there see the sources of the law, how it has arisen, and in what direction we may look for its future development. Mr. CHASE has given us an instantaneous photograph of the law as it exists to-day. He petrifies that which is ever changing and developing. We do not think this is the way either to understand legal principles or to learn how to apply them to the facts of new cases. These remarks, however, must not be taken to detract from the praise which is justly due Mr. CHASE for having accomplished in such an admirable manner the task which he has set before him.

BOOKS RECEIVED.

PENNSYLVANIA COLONIAL CASES. The Administration of Law in Pennsylvania Prior to A.D. 1700, as shown in the Cases Decided and in the Court Proceedings. By Hon. SAMUEL W. PENNYPACKER, LL.D. Philadelphia: Rees, Welsh & Co., 1892.

AMERICAN PROBATE REPORTS, VOL. VII, WITH NOTES AND REFERENCES. By CHARLES FISK BEACH, JR., of the New York Bar. New York: Baker, Voorhis & Co., 1892.

A TREATISE ON THE LAW OF INSURANCE: FIRE, LIFE, ACCIDENT AND MARINE. Second edition. With a Selection of Leading Illustrative Cases and an Appendix of Statutes and Forms. By GEORGE RICHARDS, of the New York Bar and Lecturer on Insurance Law in the School of Law of Columbia College. New York and Albany: Banks & Brothers, 1892.

BENJAMIN'S TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY. Sixth American edition, with American Notes by EDMUND H. and SAMUEL C. BENNETT. Houghton, Mifflin and Company, 1892.

A MANUAL OF MEDICAL JURISPRUDENCE AND TOXICOLOGY. By HENRY C. CHAPMAN, M.D., Professor of Institutes of Medicine and Medical Jurisprudence in Jefferson Medical College of Philadelphia. Philadelphia: W. B. Saunders, 1892.

BY-LAWS OF PRIVATE CORPORATIONS. By LOUIS BOISOT, Jr. Chicago: The United States Corporation Bureau, 1892.

A MANUAL OF MEDICAL JURISPRUDENCE. By ALFRED SWAINE TAYLOR, M.D., F.R.D. Eleventh American edition. By CLARK BELL, Esq. Philadelphia: Lea Brothers & Co., 1892.

THE AMERICAN DIGEST ANNUAL, 1892. A digest of all the decisions of the courts of the United States and the courts of last resort of the States and Territories, etc., September 1st, 1891, to August 31st, 1892. Prepared and edited by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co., 1892.

AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION. By MORRIS M. COHN. Baltimore: Johns Hopkins Press, 1892.

UNITED STATES CIRCUIT COURT OF APPEALS REPORTS. Vol. I. St. Paul, Minn.: West Publishing Co., 1892.

ABSTRACTS OF RECENT CASES.

[Selected from the current of American and English Decisions.]

BY

HORACE L. CHEYNEY, HENRY N. SMALTZ, JOHN A. MCCARTHY.

AEROLITE—APPROPRIATION BY FINDER.—The owner of the soil upon which aerolite falls may maintain replevin against one who finds it there and carries it off: *Goddard v. Winchell*, Supreme Court of Iowa, October 4, 1892, *WINCHELL*, J. (52 Northwestern Rep., 1124).—*J. A. McC.*

BAILMENTS, GRATUITOUS—BANKS—SPECIAL DEPOSITS—LIABILITY FOR LOSS.—The essence of a contract for bailment is diligence. A special deposit was received by a bank through its cashier for gratuitous safe keeping. The cashier appropriated the deposit to its own use. *Held*: the bank is not liable if it can prove that it exercised due diligence in selecting the cashier, and in not keeping him in office after it knew or ought to have known, that he was untrustworthy. For in appropriating the deposit to his own use, the cashier would not be acting in the bank's business or within the scope of his employment: *Merchants' National Bank of Savannah v. Guilmartin*, *LUMPKIN*, J., August 23, 1892 (15 S. E. Rep., 831).—*W. D. L.*

CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—RULES OF COMPANY—RIDING IN EXPRESS CAR.—In an action for damages received in a collision, it appeared that the plaintiff, knowingly violating the defendant's rule, was in the express car at the time the accident occurred; that he would not have been injured had he been in a passenger coach, in which there was room; and that the conductor of the train, although he knew the plaintiff's position, did not enforce the rule. *Held*: that where a passenger, knowing the existence of a rule of the company, willfully violates it, in an action for the recovery of damages for injuries received in consequence of such violation, he cannot rely upon the mere delinquency of the conductor or other agent charged

with its enforcement in the absence of anything which establishes the concurrence of the company in the disregard of the regulation : *Florida So. Railway Co. v. Hirst*, Supreme Court of Florida, July 20, 1892, per RANBY, C. J. (11 So. Rep., 506).—*H. N. S.*

COMMON CARRIERS—LIABILITY FOR LOSS OF GOODS—ACT OF GOD.

—The 2066 section of the code of Georgia reads as follows: "A common carrier . . . is bound to use extraordinary diligence. In case of loss the presumption is against him, and no excuse avails him, unless it was occasioned by the Act of God, or the public enemies of the State." *Held*: that no degree of diligence whatever will excuse a common carrier unless the loss occurs through an act of God or public enemies, and where the immediate agency of the loss is shown to be an act of God, the presumption still is that the loss is due to negligence, and in order to combat this presumption it must be shown by the carrier that the act of God is the sole cause of the loss : *Richmond and D. R. R. Co. v. White*, Supreme Court of Georgia, BLECKLEY, C. J., October 1, 1892 (15 S. E. Rep., 802).—*W. D. L.*

CONSTITUTIONAL LAW—TAXATION—WHAT CONSTITUTES A DEALER.

—The State of Georgia taxes in the form of a license all sewing machine companies doing business in the State. The license tax is fixed; that is it does not depend on the amount of the business. *Held*: that this tax was constitutional as applied to sewing machine companies whose plants were in other States. And, *Held*: that one who receives orders for sewing machines, forwards these orders to the manufacturer, receives the machines when sent in pursuance of the order and sends them to the purchasers, does *not* engage in the business of selling sewing machines, or become a dealer in them, or an agent : *Weaver v. State*, Supreme Court of Georgia, SUMMONS, J., May 16, 1892 (15 Fed. Rep., 840).—*W. D. L.*

CONTRACT OF EMPLOYMENT—EIGHT HOUR LAW.—Plaintiff, who

was an engineer in the employ of defendant, brought an action to recover compensation for services rendered beyond the eight hours which constitute a day's work under the laws of Indiana. There had been no agreement as to the number of hours which should constitute a day's work, and the plaintiff worked overtime solely because required so to do by the defendants. *Held*: that while under the laws of Indiana work overtime by agreement is permitted for an extra compensation, yet where one enters into an employment knowing he will be expected to work overtime, and continues to work overtime without objection, or giving notice of his intention to charge therefor, it will be implied that he consented to the requirements of his employees, and he cannot recover for the hours he worked each day beyond eight hours, as extra time : *Helphensteine v. Hartig, et al.*, Appellate Court of Indiana, September 27, 1892, per NEW, J. (31 N. E. Rep., 845).—*H. N. S.*

CONTRACT, ASSIGNMENT OF — FORECLOSURE — EJECTMENT BY MORTGAGEE.—A leased eighty acres of school land from the State, and subsequently entered into a contract with B to surrender the lease to

him, B to advance the first payment and purchase the land from the State taking the contract in his own name, while A, upon repayment of the money advanced and interest thereon was to receive an assignment of the contract. A died, and B filed his claim against the estate for the money loaned, but afterwards withdrew the same and assigned the contract to the plaintiff, A's father. Neither A nor his wife, the defendant, had repaid any part of the money loaned and paid out by B. *Held* (1), that the plaintiff stands in the shoes of B, and if therefore entitled to a decree of foreclosure and sale for the amount due; (2) but that the plaintiff could not recover possession of the land in a legal action of ejectment, since he had only an equitable title, and in this State a mortgagee cannot maintain ejectment. *Malloy v. Malloy*, Supreme Court of Nebraska, September 21, 1892 (MAXWELL, C. J.), 52 N. W. Rep., 1097.—*J. A. McC.*

EQUITY, DISMISSAL IN—PAYMENT OF COSTS.—The plaintiff brought an action in the United States Circuit Court, which was dismissed upon the plaintiff's failure to appear, and an order directed ordering the plaintiff to pay costs. He subsequently brought an action in the State Court where upon a motion to dismiss the suit because of non-payment of costs in the Federal Court, it was *held*: that the rule of the common law which prevented the plaintiff from maintaining a second suit until the costs in a former action concerning the same subject-matter were paid, had not been adopted by the Code; but that the rule of equity which is governed by all the circumstances of any case, permitting the second action to proceed whenever a valid excuse is shown by the non-payment of costs, prevails. *Union Pac. R.R. v. Mertes*, Supreme Court of Nebraska, September 21 1892, MAXWELL, C. J. (52 Northwestern Rep., 1099).—*J. A. McC.*

GIFTS—INTER VIVOS—DELIVERY—ELECTION OF ACTIONS.—A donor had deposited bonds and coupons with a bank, and took a writing signed by the cashier acknowledging their receipt, and that they were to be sold and the proceeds placed to her credit. She subsequently endorsed this receipt as follows: "Please let my nephew have the amount of the within bill, and oblige L. P." The defendant, upon the faith of this receipt, paid over to the nephew the amount represented by the bill. *Held* (1), that delivery of the receipt was sufficient to uphold a gift of the money represented by it; (2) that in an action brought by the donor's administrators against the bank, the fact that the administrators formerly sued the donee and recovered judgment for the same funds constitutes an election and ratification of the payment made by the bank to the donee, and precluded a subsequent action against the bank on the same claim. *Crook v. First National Bank*, Supreme Court of Wisconsin, September 27, 1892, PINNEY, J. (52 N. W. Rep., 1131).—*J. A. McC.*

INSURANCE—CONDITIONS OF POLICY.—The fact that the loss of the party assured has not been submitted to arbitration before suit brought as provided by the conditions of the policy cannot avail as a defense, where the plaintiff upon seeking an adjustment of the loss soon after it occurred was met with a denial of all liability on the part of the defendant and an assertion that the policy was not in force. *Savage v. Phoenix Ins. Co.*, Supreme Court of Montana, September 13, 1892, HARWOOD, J. (21 Pac. Rep., 68).—*J. A. McC.*

INSURANCE, LIFE—CONDITIONS IN POLICY—INSANITY—SUICIDE.—A life insurance policy did not cover the risk of suicide, but provided that in the event of the insured's suicide, "whether sane or insane," the company should be liable only for the "sum of the net premiums, previously received, without interest." The insured was found dead, and the coroner's jury found that the cause of death was insanity. There was no other evidence tending to show the circumstances or causes of death. Exceptions having been taken to the judgment of the lower court in an action of assumpsit in favor of the plaintiff for the amount of premiums: *held*, that there is no presumption of suicide, where the cause of death is "insanity," and the person was found dead, the circumstances of death remaining unknown. Under the facts, the presumption is that the death was natural or accidental, and the plaintiff is entitled to a directed verdict for the full amount of the policy. *Waycott v. Metropolitan Life Ins. Co.*, Supreme Court of Vermont, August 25, 1892, per THOMPSON, J. TAFT, J., dissenting. (24 Ath. Rep., 992.)—*H. N. S.*

INSURANCE—POLICY—LIMITATION AS TO TIME OF BRINGING SUIT.—Where a policy of insurance provides that no suit or action against the company "unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur," and another clause of the same policy provides that the company shall be allowed sixty days after satisfactory proofs of loss shall have been submitted to the company in which to pay said loss; the twelve months limitation as to suit does not commence to run until the expiration of sixty days after presentation of proof of loss: *Steel v. Phoenix Ins. Co.*, Circuit Court of Appeals of the United States, Ninth Circuit, July 18, 1892, HAWLEY, J., MCKENNA, J., dissenting (51 Fed. 715).—*H. L. C.*

MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE—ADVICE OF COUNSEL.—In an action brought for malicious prosecution it appeared, that the proceedings against the plaintiff had been commenced by the advice of the defendant's attorney; that at a hearing before a magistrate the plaintiff was discharged for want of jurisdiction; and that the prosecution was *nolle pros'd* in another county after the prosecutor had been advised by his attorney that, without reference to the truth of the charge, the prosecution was likely to fail for want of jurisdiction. *Held*: That the advice of counsel that the facts upon which the prosecution is based is not only a defence to an action for malicious prosecution, but taking such advice and acting thereon rebuts the inference of malice arising from the want of probable cause. That under the facts, neither the discharge by the magistrate nor by the Court was a fact from which either want of probable cause or malice could be inferred: *McClafferty v. Philp*, Supreme Court of Pennsylvania, October 3, 1892, per STERRETT, J. (24 Atl. Rep., 1042).—*H. N. S.*

MUNICIPAL CORPORATION—EXCAVATING BEYOND CITY LIMITS—LIABILITY FOR DAMAGES—ULTRA VIRES.—A declaration alleging that the mayor and council of a city had "cut or caused to be cut a deep ditch or excavation near, in and upon the south side of a lot of land belonging to petitioner" (outside the city limits), thereby causing damage, was rightly dismissed on demurrer, as it set forth no legal cause of action.

The acts of the city authorities complained of were *ultra vires*, they having, at the time the acts were done, no power or jurisdiction over the land in question. Consequently the municipal corporation is not liable for damages resulting from such acts: *Lord v. Mayor, etc., of City of Columbus*, Supreme Court of Georgia, per CURIAM, August 27, 1892 (15 S. E. Rep., 818).—*W. D. L.*

NEGOTIABLE INSTRUMENT—CONSIDERATION.—In an action on a note for \$625 it appeared that as a consideration for the note, the plaintiff transferred to defendant a one-half interest in a note for \$2,500, on which the maker thereof agreed to pay \$1,250 as a compromise. *Held*: That the fact that afterwards in an action thereon, the latter note was declared to have been made without consideration does not affect the consideration for the note in suit, and plaintiff should recover: *Bean v. Proseus*, Supreme Court of California, September 12, 1892, PATTERSON, J. (31 Pac. Rep., 49).—*J. A. McC.*

RAILWAY COMPANIES—CONNECTING LINES—INTERSTATE COMMERCE ACT.—Section 3 of the Interstate Commerce Act prohibiting any common carrier from making or giving "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatever," etc., does not compel any railroad company to receive freight from a connecting line and transport the same in the cars in which it is tendered, and to pay the usual car mileage on such cars. In the absence of a contract between connecting lines there is no obligation to transport freight in the cars in which it is tendered if the freight is not of such a character that it will be injured by transfer and if the company to which the freight is tendered has cars of its own ready for such service. But if the connecting line transports the freight in the cars in which it is tendered, the usual mileage for the use of such cars must be paid. Neither does said section compel a railway company receiving freight from a connecting line to advance or assume the payment of the charges due thereon for the transportation from the point of origin to the connecting line: *Oregon Short Line & U. N. Rwy Co. v. Northern Pacific Rwy Co.*, Circuit Court of the United States, District of Oregon, June 13, 1892, FIELD, J., DRADY, J., dissenting (51 Fed. Rep., 465).

WILLS—CONSTRUCTION—BEQUESTS CHARGED ON LAND.—A testator, after making sundry pecuniary bequests, gave to a son and daughter "all the balance or residue of his estate, real and personal." After payment of the debts and costs of administration there was not sufficient left to pay the bequests. Upon a petition filed by the administrator for the sale of certain real estate to make assets, *held*: That in the absence of specific devises of real estate the testator, by including his real estate in the residuary clause along with his personal estate intended to treat them as a common fund, thereby charging his whole estate with the payment of the legacies; and it was therefore the duty of the administrator to sell the real estate for that purpose: *American Cannel Coal Co. v. Clemens, et al.*, Supreme Court of Indiana, September 13, 1892, per OLDS, J. (31 N. E. Rep., 786).—*H. N. S.*

THE
AMERICAN LAW REGISTER
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DECEMBER, 1892.

THE AMERICAN SIDE OF THE BEHRING SEA
CONTROVERSY.¹

BY STEPHEN B. STANTON, ESQ.

To destroy the last and most valuable seal fishery of the world is to violate no right and to transgress no law. Such is the contention of Great Britain in the Behring Sea Controversy.

In his clear and able article entitled, "The British Side of the Behring Sea Controversy," in the November number of this magazine, Mr. GODKIN assumes for the purpose of argument "that the circumstances under which these British subjects take the seals are such as have resulted in a distinct diminution in the number of seals in the Behring Sea, and will eventually result in their extermination." We may take this to be equally the position assumed by the British Government in the discussion of the legal aspects of the Behring Sea Controversy. It is true that the destructive character of the methods of

¹See "The British Side of the Behring Sea Controversy," by LAWRENCE GODKIN, Esq., in the November number of THE AMERICAN LAW REGISTER AND REVIEW (1892).

fishing pursued by the Canadian sealers of the Behring Sea is a fact at issue between the two countries, and awaits final determination at the hands of the Board of Arbitration, which convenes in Paris during the coming winter. Nevertheless, the attitude of Great Britain in this matter is practically one of demurrer, whereby it contends that even if the fact be as the United States states it, this country is not thereby justified in its policy of interference in the Behring Sea. We shall, therefore, follow Mr. GODKIN'S lead in arguing upon the assumption of such fact.

It is not the purpose of this article to take up the question of property rights in the Behring Sea seal fishery or in the seals themselves, or that of jurisdiction over the waters of the Behring Sea, derived by transfer from Russia. These questions have received skillful elaboration in the recent diplomatic correspondence between Great Britain and the United States. But we wish now to approach the controversy from another standpoint—from the standpoint of British sealing rather than that of American interference. We wish to take the cue given by Secretary BLAINE, when, in replying to the protests of the British Government against the United States seizure of Canadian sealing schooners, he neatly turned the situation upon Great Britain, thus:

"In turn, I am instructed by the President to protest against the course of the British Government in authorizing, encouraging and protecting vessels which are not only interfering with American rights in the Behring Sea, but which are doing violence as well to the rights of the civilized world."¹

England has been so occupied with proving the United States wrong, that she has omitted to prove herself right. In her anxiety to deny the national claims of the United States, she has neglected to show sufficient international justification for her own course.

One of two things must be true about the waters of

¹ Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, May 29, 1890

the Behring Sea and the seal fishery contained therein. Either they belong to, or are within, the jurisdiction and control of the United States, as that country claims, or else they are the common property of all mankind. These are the alternatives on the question of ownership which confront Great Britain. She denies the former; therefore she admits the latter.

This article will, therefore, take England at her word, accept the theory of ownership and jurisdiction in the Behring Sea for which she contends, *i.e.*, free sea and common property, and attempt to show that even on that theory Great Britain is guilty of an international offence justifying the intervention of the United States.

Assuming then that the Behring Sea is a free sea, what are its characteristics; and assuming that its seal fishery is common property of the world, to whom does it belong? The sea is what GROTIUS calls "public according to the law of nations," or "common property of all by the law of nature."

"That is named public which belongs not to any particular nation, but to civilized humanity; what in law is called public, according to the law of nations; that is, common to all, the individual property of none. . . . The sea is the common property of all."¹

This common character of the sea necessarily excludes the idea of its use by any one people so as to interfere with its similar use by another:

"The use of common property because it belongs to all, can no more be torn from all by one, than I may be deprived of what is mine. This is what CICERO calls one of the strongest bulwarks of justice, that common property should be reserved for the use of all."²

That characteristic which in part gave rise to the law of its freedom, *i.e.*, its sufficiency for the use of all, is inalienable from a free sea:

"It is manifest," as VATTEL puts it, "that the use of

¹GROTIUS "Mare Liberum," Cap. V.

²Id.

the open sea, which consists in navigation and fishing, is innocent and inexhaustible, that is, he who navigates or fishes in it, does no injury to any one, and that the sea, in these two respects, is sufficient to all mankind."¹

The use of a resource of the sea in such a manner as to interfere with its common use by others, is clearly a violation of the law of the commonalty of the sea. "The right of navigating and fishing in the open sea," says VATTTEL, "being then a right common to all men, the nation who attempts to exclude another from that advantage, does it an injury."

"We may, moreover, say, that a nation, which, without a title, would arrogate to itself an exclusive right to the sea, and support it by force, does an injury to all nations whose common right it violates."²

Such an arrogation to herself of an exclusive right to the sea, we claim it to be on the part of Great Britain to destroy the seal fishery of the Behring Sea. The right to fish in a free sea is not unlimited. No nation may exercise that right regardless of the equal rights of others. *Sic utere tuo ut alienum non laedas* must hold true here as well as elsewhere. The destruction of a fishery has the same effect upon the right of others as would their forcible exclusion from that advantage or the arrogation to oneself of an exclusive right. If its effect be the same, it must fall within the same rule of law. Great Britain claims the right to catch seals in the waters of the Behring Sea because it is a free sea. Then all other nations must have the same right. Whence does she draw her authority for putting an end to that right of other nations, by destroying the fishery itself to which the right relates?

It is true that by her acts of destructive seal fishing, she does not immediately exclude others from participation in seal catching. For the present, she leaves all other nations free to come in and join her in the work of exterminating the seal by pelagic sealing. But her course

¹ VATTTEL'S "Law of Nations," § 281.

² Id., §§ 282 and 283.

of action, although no abridgment of the temporary right of other nations, is a violation and total annihilation of their permanent right. "In exterminating the species, an article useful to mankind is totally destroyed in order that temporary and immoral gain may be acquired by a few persons."¹ All nations have the right *in futuro* as well as now, to catch seals in the Behring Sea, which right carries within it the incidental right as against each other to the perpetuation, or at least preservation from destruction of that seal fishery. PHILLIMORE declares that "no presumption can arise that those who have not hitherto exercised such rights, have abandoned the intention of ever doing so."² For a few years at most, Great Britain may leave the free and commonright to catch seals in the Behring Sea undisturbed. But at the end of that time, the fishery will be gone, carrying with it the right of the world to its enjoyment. This differs but in name from an exclusion of others from a common advantage and an arrogation by Great Britain to herself of an exclusive right to the sea, which is practically a theft of common property.

A measure of the international offence committed by Great Britain in persevering in methods of fishing leading to the destruction of the common property of all nations is to be found in the condition of the fur seal industry before it was interrupted by the acts of England. Let us glance at the picture presented by Mr. BLAINE of the universally beneficial way in which that industry was then conducted. Its remote scene of operation was a "sea which," as he describes it, "lies far beyond the line of trade, whose silent waters were never cloven by a commercial prow, whose uninhabited shores have no port of entry and could never be approached on a lawful errand under any other flag than that of the United States."³ "The entire business was . . . conducted peacefully,

¹ Letter from Mr. BLAINE to Sir JULIAN PAUNCFOTE, May 29, 1890.

² "Commentaries upon International Law," by Sir ROBERT PHILLIMORE. Vol. I, § 174.

³ Letter from Secretary BLAINE to Sir JULIAN PAUNCFOTE, December 17, 1890.

lawfully and profitably—profitably to the United States, for the rental was yielding a moderate interest on the large sum which this government had paid for Alaska, including the rights now at issue; profitably to the Alaskan Company, which, under governmental direction and restriction, had given unwearied pains to the care and development of the fisheries; profitably to the Aleuts, who were receiving a fair pecuniary reward for their labors, and were elevated from semi-savagery to civilization and to the enjoyment of schools and churches provided for by the government of the United States; and, last of all, profitably to a large body of English laborers who had constant employment and received good wages.”¹

Connecting Behring Sea with the Pacific Ocean are the passes which separate the islands of the Aleutian chain. Through these, in the late spring, draw the returning hordes of the fur seal after their wintering in the warmer waters of the Pacific. “The convergence and divergence of these watery paths of the fur seal to and from the Seal Islands resembles the spread of the spokes of a half wheel—the Aleutian chain forms the felloe, while the hub into which these spokes enter is the small Pribyloff group.”² So that upon the seal islands of the Pribyloff group, St. George and St. Paul is cast nearly the whole mass of these returning fur seal millions. Here, then, are their natural rookeries.

In these islands the fur seal is obliged annually to haul out for the purpose of breeding and shedding its pelage.

The male seals or bulls require little food during the five or six summer months, sustaining existence on the blubber secreted beneath their skin. They, therefore, remain ashore watching the rookeries. Thus it is that the greater part of seals found during the summer at any distance from the islands are females in search of food for

¹ Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, March 1, 1890.

² Report of Hon. Henry W. Elliott, of the Smithsonian Institute, to Mr. Bayard, December 3, 1887.

themselves and their young. Great discrimination in the selection of the seals was exercised and enforced by the Alaska Company. Only the young bulls were permitted to be slain; they were first driven inland from the sandy parts of the islands whither the old bulls had driven them, and then clubbed to death in order that their skins might not be perforated.

On the other hand, if these seals are hunted in the sea, not only is discrimination impossible, but nearly one out of every three so slaughtered sinks and is lost. Besides, as we have stated, nearly none but the females frequent the open sea during the summer.

These conditions of seal life led the United States early in her possession of this territory of Alaska to enact a law that "no person shall kill any . . . fur seal . . . within the limits of Alaska Territory or in the waters thereof."¹ The exclusive right to take seals was then sold to the Alaska Company, which conducts its business in the careful and conservative manner above described.

"Into this peaceful and secluded field of labor, whose benefits were so equitably shared by the native Aleuts of the Pribilof Islands, by the United States and by England, certain Canadian vessels in 1886 asserted their right to enter, and by their ruthless course to destroy the fisheries and with them to destroy also the resulting industries which are so valuable."²

These words well express the international indictment against Great Britain.

It is claimed, however, that according to the slave trade decision, made in the great case of *Le Louis*,³ pelagic sealing cannot be construed into an international offence. *Le Louis* was a French ship engaged in the slave traffic which was seized by a British armed vessel in 1816 for violating the terms of the British Slave Trade Act. The question arose on the trial whether participation

¹ U. S. Revised Statutes, § 1956.

² Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, January 22, 1890.

³ 2 Dodson, 211.

in the slave trade was an international offence, and so one which would warrant the capture upon the high seas of the vessel of one power by that of another; and it was held that it was not. Then argues Mr. GODKIN:

“The killing of seals in breeding time is not, any more than the slave trade was, an offence against the recognized law of nations.”

But the grounds for the decision show its inapplicability to the Behring Sea Controversy. Lord STOWELL held that the act for which the vessel of one nation could in time of peace seize the vessel of another nation must be “unquestionably and legally criminal by the universal law of nations;” and that participation in the slave trade was not an act of this character. The reason is at once apparent. In 1816 when *Le Louis* was captured nations were still divided on the question of the lawfulness of the slave trade, and individuals on its morality even. From the beginning of history, slavery and its necessary incident, the slave trade, had been a recognized institution, sanctioned at times by nearly universal usage and intrenched in the private law of nearly all nations. Lord STOWELL himself thus describes how far from internationally criminal the slave trade at that time was:

“Let me not be misunderstood, or misrepresented, as a professed apologist for this practice, when I state facts which no man can deny,—that personal slavery arising out of forcible captivity is coeval with the earliest periods of the history of mankind,—that it is found existing (and as far as appears, without animadversion) in the earliest and most authentic records of the human race. That it is recognized by the codes of the most polished nations of antiquity,—that under the light of Christianity itself, the possession of persons so acquired has been in every civilized country invested with the character of property, and secured as such by all the protection of law,—that solemn treaties have been framed and national monopolies eagerly sought, to facilitate and extend the commerce in this asserted property,—and without any opposition, except the protests of a

few private moralists, little heard and less attended to, in every country, till within these very few years, in this particular country. If the matter rested here, I fear it would have been deemed a most extravagant assumption in any court of the law of nations, to pronounce that this practice, the tolerated, the approved, the encouraged object of law, ever since man became subject to law, was prohibited by that law, and was legally criminal. But the matter does not rest here. Within these few years a considerable change of opinion has taken place, particularly in this country. Formal declarations have been made and laws enacted in reprobation of this practice; and pains, ably and zealously conducted, have been taken to induce other countries to follow the example; but at present with insufficient effect; for there are nations which adhere to the practice, under all the encouragement which their own laws can give it. What is the doctrine of our courts of the law of nations relatively to them? Why, that their practice is to be respected."

But destruction of another's property is an act of a very different nature. It is forbidden by the law of every civilized nation. Can it be doubted that if in time of peace France undertook to attack and demolish British property, Great Britain would be justified in interfering and capturing the French offenders? Now substitute for British property in this illustration, common property, that is, property belonging not to one nation alone, but to all nations alike, and is the offence of destruction any less, but not rather greater? Such an act, we claim, complies with Lord STOWELL'S test of international crime, *i. e.*, it is an act which is "unquestionably and legally criminal by the universal law of nations.

In applying the case of *Le Louis* to the present question, Mr. GODKIN has disguised the actual destruction threatened, under the more harmless term, "the killing of seals in breeding time." But even if the violation of national game laws regarding seals should have as its consequence merely the usual diminution of the species, if

such a violation can be made a punishable offence by an individual or a national owner, why is it not equally a punishable offence when directed against all mankind? The absence of express international regulations on the subject, which is unavoidable under the present imperfect organization of international law, affects the question of notice only and does not alter the character of the offence.

Mr. GODKIN objects, further, to the application of the term *contra bonos mores* to a method of sealing which he admits to be destructive of the species. He states that an act to be *contra bonos mores* must be one which is "contrary to some rule of conduct which is recognized by civilized nations to be a rule of conduct *for reasons of morality*." Destruction of a seal fishery, says he, is not immoral but only inexpedient. We do not agree with Mr. GODKIN that immorality is of necessity implied in the expression *contra bonos mores*. A more natural rendering of it would appear to be "tortious" or "criminal;" and in the context in which Mr. BLAINE employed it, "internationally tortious or criminal." Into an act of this character, immorality might or might not enter as in the case of ordinary torts and crimes. Nevertheless the act of destruction of the world's most valuable seal fishery falls clearly within the terms of even Mr. GODKIN'S interpretation of *contra bonos mores*.

If to take the property of another is immoral, its destruction, which is a method of taking precluding a return, is doubly so. That the property destroyed is not the property of an individual or of one nation, but of all nations, of mankind at large, renders the act not less but rather the more immoral.

The question next arises, to what extent and by what means are international wrongs of this character prevented or punished. Does the equitable maxim *ubi jus ibi remedium* prevail in international as well as in private jurisprudence? It is well established that the powers may in concert legislate and act for the general welfare of mankind. Such care

for the universal welfare has even been carried to the length of interfering for that object in the internal affairs of nations. This is the well-known principle of intervention. Prominent illustrations of its exercise may be found in the international regulations adopted for the protection of the lives or rights of christians in Turkey and China. An instance in which the motive was perhaps less the actual safety or welfare of those in whose behalf the intervention was undertaken than it was the interests of commerce and the repose of Europe, is the Greek Revolution of 1828. England as well as other European powers then determined that the welfare of mankind at large authorized interference in and control over the acts of another nation, not merely upon the high seas which is outside of all national jurisdiction, but even within the limits of the jurisdiction of another nation. The reasons which the powers then assigned as sufficient for that intervention are given in the preamble of the treaty which was signed by France, Russia and Great Britain, at London, on July 6, 1827, and wherein it is recited that these nations were "penetrated with the necessity of putting an end to the sanguinary contest which by delivering up the Greek provinces and the isles of the Archipelago to all the disorders of anarchy, produces daily impediments to the commerce of the European States, and gives occasion to piracies which not only expose the subjects of the high contracting parties to considerable losses, but, besides, render necessary burdensome measures of protection and repression."¹

The jurist WHEATON, commenting on this recital of reasons, implies that the protection of commerce is no pretext or incidental motive merely. He writes:

"'Whatever,' as Sir JAMES MACKINTOSH said, 'a nation may lawfully defend for itself, it may defend for another nation if called upon to interfere.' The interference of the christian powers to put an end to this bloody contest might, therefore, have been safely rested upon this

¹ Wheaton's International Law, § 69.

ground alone without appealing to the interests of commerce and of the repose of Europe, which, as well as the interests of humanity, are alluded to in the treaty as the determining motives of the high contracting parties."¹

Now, if nations may for the common welfare of mankind or for their commercial interests so interfere within the confines of an offending nation, can it be doubted that they may interfere to protect common property and universal rights outside of the confines of an offending nation? Can it seriously be questioned that the powers of the civilized world possess authority to protect and control the use of property reserved for the use of all mankind, such as the Behring Sea seal fishery? We have already shown that by destroying the fishery, England, in Vattel's language, "arrogates to" herself "an exclusive right to the sea," and we may, therefore, aptly quote against her his remarks: "That a nation which without a title would arrogate to itself an exclusive right to the sea, and support it by force, does an injury to all nations whose common right it violates, and all are at liberty to unite against it in order to repress such an attempt. Nations have the greatest interest in causing the law of nations, which is the basis of their tranquility, to be universally respected. If any one openly tramples it under foot, all may and ought to rise up against him; and, by uniting their forces to chastise the common enemy, they will discharge their duty toward themselves and toward human society of which they are members."

But it is perfectly obvious that adequate international protection cannot always be obtained or afforded through the regular steps of convention, treaty and concerted action. In many cases, protection of the common rights or property of mankind will demand immediate action; before international justice could be meted out by regular procedure, much time must elapse, and during the interval irreparable damage might ensue. Delay of the remedy might even lead to destruction of the subject matter of the dispute. It

¹ Wheaton's International Law, § 69.

² Vattel's Law of Nations, § 283.

is unreasonable to ask that the relief demanded by the exigencies of the occasion be withheld until representatives of all nations concerned convene and authorize some definite course of action. It would, for instance, be disastrous stickling for international propriety to insist that only expressly and formally delegated agents of the powers can repel a trespass upon mankind's common property. In international as well as in municipal law, it must be possible to check at the outset acts which if unchecked will, before the arrival of relief dispensed through the slower channels of justice, do irreparable damage. In municipal law, the danger is averted by the interlocutory injunction. Such a remedy then there must needs be for the perfect protection of common rights and property in international law. The procedure in the case of the international interlocutory injunction must, of course, comply with the necessities of the situation. There is no permanent international tribunal to which an immediate application for such a remedy may be made. Therefore, the event must justify the act; an appropriate international convention must subsequently ratify the enforcing of the temporary injunction, or else, in close analogy to municipal law, impose upon the nation needlessly applying such a remedy the payment of damages for the consequence of its rash act.

In the Behring Sea controversy the need of such an immediate remedy, as that above discussed, can easily be pointed out. In 1886, the methods of sealing began in the Aleutian Straits and in the open waters of the Behring Sea, which Mr. GODKIN's assumption justifies us in characterizing as methods "such as have resulted in a distinct diminution in the number of seals in the Behring Sea, and will eventually result in their extermination." For three summers, were they not only unchecked by Great Britain, but were even encouraged; and but for the protests and active interference on the part of the United States these methods would doubtless have continued to be employed to this day. During the seasons of 1891 and 1892 the United States was forced to buy off British sealing by renouncing

during those seasons its catch upon its own shores, although this had always been conducted, as has been shown, with perfect safety to the perpetuation of the species. From Secretary BAYARD'S circular letter of August 19, 1887, to the recent correspondence resulting in the selection of the Board of Arbitration which is to meet in Paris during the coming winter, frequent efforts have been made by both countries to bring the matters in dispute before an international board of arbitration. And yet now at the end of six years, the questions are still open and the controversy unsettled.

Is it seriously maintained by Great Britain that for a period of six years during which time, despite every effort of both countries, no international tribunal could be agreed upon to which to submit the dispute, the slaughter of seals in Behring Sea should have been allowed to continue? Should the civilized nations of the earth, including the United States, have been passive on-lookers to this destruction, simply because no international convention had commissioned any particular one of them to step in and interfere? Is it consistent to proceed with measures for the settlement of a dispute, and at the same time to take no steps for the preservation of the subject-matter itself? It would rival the famous Jarndyce chancery suit, if when the dignitaries of the high contracting parties should be about to set their hands and seals to an agreement having for its purpose the preservation of the seal species, they should suddenly discover that the seal species has already been exterminated. The mockery which such a discovery would make of international justice would be crowned on learning that this extermination was the work of one of the high contracting parties themselves.

There is another analogy from the private law injunction which should be noticed here. To obtain a temporary injunction it is not necessary to prove beyond doubt that the act to be enjoined will work irreparable damage but simply to give *prima facie* evidence of that fact by affidavit. Without wishing to institute too exact parallels, yet we think that

the solemn statement of a nation must in International Law be equivalent in weight, and should be equivalent in effect to such an affidavit. Therefore, even if the allegation of the United States regarding the destructiveness of the British methods of catching seals be untrue, yet Great Britain should have desisted from the methods complained of until they could be judicially passed upon. This is not asking that she permit the United States to determine the fact or the law finally. In the matter of the effect of pelagic sealing upon seal life, there is presented between the two countries, a clear-cut issue of fact. And it is but reasonable and in analogy to the existing principles of law in other fields, to demand that pending the decision of that issue, the matter and the property shall be left in *statu quo*. It is better that Great Britain should forego the profits of a few season's catch, than that the fishery be destroyed forever. Nearly all undressed fur seal skins are shipped to London, and it is estimated that their dressing and dyeing gave employment in that city to 10,000 people. Her own interest in this industry, therefore, furnishes to England a sufficient reason for avoiding even the risk of injuring the seal fishery; but the interest which the world has in the preservation of this, its last and greatest seal rookery, furnishes an imperative one.

If, as has been shown, more speedy action than that obtainable through regular international procedure be in many cases indispensable,—action in the nature of a temporary injunction,—by whom shall such injunction be enforced? Necessarily by the nation or nations most interested in averting the threatened injury. Sir JAMES MACKINTOSH says that “whatever a nation may lawfully defend for itself, it may defend for another people.”¹ It would be no extension of the spirit of this remark, to extend its letter thus: “Whatever a nation may lawfully defend for itself, it may defend for all the world.” The lack of express and previous international sanction in such national

¹ Wheaton's “Law of Nations,” p 561.

interference for the protection of international rights, is bridged over by the common law principles of agency and ratification. A nation which in an emergency takes upon itself to act as an agent for all other nations, trusts like any ordinary agent to the subsequent ratification of its act by the principal for whom it acts. But that ratification, when given, acts retrospectively and lends to the action of the agent nation all the sanction and force which the action of the concerted powers under the same circumstances would have had. Nor is this principle of agency by ratification new in its application to International Law. The Berlin Convention of 1878 insisted that the Treaty of San Stefano which embodied the results of the Russo-Turkish War then just concluded, should be submitted to it for revision and approval. This demand was rested on the theory that in declaring and waging war upon Turkey, Russia had acted as agent for the other European powers who with her had signed the Treaty of Paris of March 30, 1856. According to this treaty no one of the contracting parties might disturb the existing condition of affairs in South-eastern Europe. Russia was therefore forced either to plead guilty to a breach of faith toward the other signatory powers and accept from them such penalty therefor as they might impose upon her, or else admit that she had acted as their agent. She virtually chose the latter by laying the treaty unreservedly before the powers; and they in turn revised the treaty in many most essential points. England, it is now interesting to remember, was then foremost in advocating this international agency theory against Russia.

The foregoing principles inevitably point to the United States as the nation which by interest, ability and circumstance is constituted international agent to intervene for the protection of the seal fishery of the Behring Sea. The loss involved in the injury of this fishery, although falling on the whole civilized world, falls first and most severely upon the United States. The United States is intrenched in the islands and on the shores of that part of Behring Sea to which the controversy relates. It has upon that sea

its patrol of revenue cutters and cruisers for the enforcement of obedience, at least by its own citizens, to the statutes enacted by it for the preservation of the seal. If, in the Behring Sea controversy, international law is to be enforced by national action, it is difficult to see how a nation can be more naturally and logically constituted an agent for the enforcement of that law than is the United States.

But it may be objected that the United States has not acted in the function of agent, has named no principal, but, on the contrary, in her claims of national jurisdiction over the waters in question and national property rights in the seal fishery, has acted solely on its own behalf. Whereas in order to admit of ratification, the act to be ratified must have been done, not on account of the actor or some third person, but as agent for and on behalf of the person who ratifies.

We reply that throughout this controversy the United States has expressly declared its action to have been taken not with a view to its own interest solely but as well in the interest of the civilized world. To England, it has repeatedly made clear its international role. The universal interest of all nations in the preservation from destruction of the Behring Sea seal fishery has ever been the chiefest sanction to which the United States has reverted. Through all the intricacies of the diplomatic discussion of questions of jurisdiction and property carried on between the two countries, the United States has ever kept clearly in view the welfare of the seal fishery itself. Said Mr. BLAINE explicitly to Sir JULIAN PAUNCEFOTE: in order to establish the ground that the Canadian vessels were engaged in a pursuit which was in itself *contra bonos mores*, "it is not necessary to argue the question of the extent and nature of the sovereignty of this government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty, the Emperor of Russia, in the treaty by which the Alaskan territory was transferred to the United

States. The weighty considerations growing out of the acquisition of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view, while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government."¹

The grounds, which he then proceeds to set forth, are the value of the seal fishery to the world, the prudent manner in which the taking of seals had theretofore been conducted, and the inevitable extermination of the species which pelagic sealing threatened.

This prevailing thought of the preservation of the seal, independently of all national considerations, has been present even in the incipency of the controversy. When, in 1887, Secretary BAYARD sent circular letters to our representatives in Great Britain, Germany, France, Japan, Russia and Norway-Sweden with reference to an international settlement of the difficulty, he summed up the situation thus:

"Recent occurrences have drawn the attention of this department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring Sea.

"Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am instructed by the President so to inform you—to attain the desired ends by international co-operation."

Our ministers to these countries were thereupon "instructed to draw the attention of the government to which" they were respectively "accredited, to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seal in Behring Sea at such times and places, and by such methods as at present are

¹ Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, Jan. 22, 1890.

pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind."¹

Later, the British Government is informed by the United States: "In the judgment of this Government the law of the sea is not lawlessness. Nor can the law of the sea and the liberty which it confers and which it protects, be perverted to justify acts which are immoral in themselves, which inevitably tend to results against the interests and against the welfare of mankind. . . . The forcible resistance to which this Government is constrained in the Behring Sea is, in the President's judgment, demanded, not only by the necessity of defending the traditional and long-established rights of the United States, but also the rights of good government and of good morals the world over."²

"In exterminating the species," wrote the same pen, "an article useful to mankind is totally destroyed in order that temporary and immoral gain may be acquired by a few persons."

And even more clearly did Mr. BLAINE state this non-national character of United States interference and its role as universal agent, when, in replying to the protests of the British Government against our seizure of Canadian sealing schooners, he threw upon England the burden of justification thus:

"In turn I am instructed by the President to protest against the course of the British Government in authorizing, encouraging and protecting vessels which are not only interfering with American rights in the Behring Sea, but which are doing violence as well to the rights of the civilized world."³

It remains to observe how the theory of international jurisdiction in Behring Sea and commonalty of property in its fisheries affects the question of damages for loss sustained in consequence of injury to or the cessation of the seal

¹ Letter from Mr. BAYARD, Secretary of State, to Mr. VIGNAUD, August 19, 1887.

² Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, May 29, 1890.

³ Letter, BLAINE-PAUNCEFOTE, May 29, 1890.

industry. We think that the theory upon which the rightfulness of United States' interference to prevent the wanton destruction of the seal is decided, be it that of national jurisdiction or that of international agency, will not affect the amount of damages if any to be awarded to the United States. On the theory treated in this article, damages if awarded should be for the infringement of international or universal rights rather than national. They would thus be awarded to all nations concerned rather than directly to any one nation. A limit to the number of recipients of such an international award might well be found in the possibility of liquidating the amount of injury sustained. A large part of the loss resulting from the cessation of the seal catch since the adoption of the *modus vivendi* has undoubtedly fallen upon Great Britain herself, for, as we have said, the seal-skin trade has its centre in London. But upon the United States chiefly has fallen the loss in question. Not only has the wanton slaughter of seals by Canadian sealers so far lessened the number that come to our shores that such a partisan authority as the Inspector of Fisheries for British Columbia asserts that a continuation of such methods of sealing "will soon deplete our fur seal fishery;"¹ but Great Britain has demanded as a condition precedent of a close season in these waters on her part, that the United States shall forego its entire catch in excess of 7,500—the bare number necessary (in the language of the *modus vivendi*) "for the subsistence and care of the natives." Both Mr. BLAINE and Mr. BAYARD have pointed out that the value of Alaska consists in the seal fisheries. By causing the United States the temporary loss of the profits from these fisheries, Great Britain has temporarily lost to the United States that resource of Alaska for the sake of which in 1867 it purchased the territory. This loss is fairly represented by the annual rental paid to the United States by the Alaska Company for the privilege of the exclusive catching of seals on the Pribyloff Islands. This rental is the cost at which for the past twenty years the Company

¹ Report of Thomas Mowat.

has found it profitable to carry on its business. But, in addition to this, the Alaska Company, through the Government of the United States, should have re-imbursed to it the profits from which the prohibition of seal catching contained in the *modus vivendi* and demanded by Great Britain, has cut it off.

According to such a standard of amount and distribution, we submit that the International Board of Arbitration might justly award damages. If its decision as to the facts of seal life with reference to the effect of pelagic sealing be the same as that conceded and assumed in the discussion of the legal questions in this controversy, the damages so awarded should be decreed to be paid by Great Britain.

New York, November, 1892.

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DEPARTMENT OF PROPERTY.

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PULLING'S ESTATE—LOTHROP'S APPEAL.¹ SUPREME
COURT OF MICHIGAN.*Ante-nuptial Release of Dower.*

By an ante-nuptial agreement, in consideration of five dollars and love and affection, a woman, of 40 years, released all claim which she, "as widow," might have in the estate of her intended husband (who was a widower of 75 years with children), "whether in right of dower or as her distributive share in the personalty or otherwise, under the laws of the State." Two days later the woman signed a declaration, reciting the contemplated marriage and the execution of the ante-nuptial agreement, in which she stated, "that the money value makes no difference in my action. I do not care to know the value of his estate; it is the same to me whether it be \$1,000 or \$500,000. In view of the information that the value of his estate may be \$500,000, I repeat and confirm my said deed of relinquishment. I sign this statement, that there may be no question but that I fully understood what I was doing." Three days later the marriage was celebrated. On that day the husband executed a paper, which was found upon his death, about ten weeks afterward, wherein he said: "I expect to provide for her future, consistent with my ability in a financial way; she confided in me entirely about doing for her what was just and proper." During the marital relation he conveyed to his wife a life estate in his homestead, valued at \$10,000, and \$1,500 worth of furniture therein. In his will he made no provision for his widow. His estate consisted of \$88,000 in personalty and \$40,000 in realty, besides the homestead, and his widow claimed her distributive share.

Held: That neither at the common law nor under the Statute of the State did the ante-nuptial release bar dower. Its enforcement would be the perpetration of a fraud. The relation was one of confidence. The declaration of the woman that she did not care to know the value of the estate, was explained by the paper signed by the husband upon the day of marriage. The widow was accordingly awarded her distributive share of the personalty.

¹ Reported in 52 N. W. Rep., 1116. Decided Oct. 4, 1892.

STATEMENT OF CASE.

Error to the Circuit Court of Wayne County, upon an appeal thereto from an order of the Probate Court, awarding Jeane W. Pulling her distributive share of the personal estate of Dr. Henry P. Pulling, deceased. Ada M. Lothrop, *et. al.*, heirs at law, took this writ of error. *Affirmed.*

Opinion by LONG, J.

DOWER, AND ANTE-NUPTIAL RELEASE OF DOWER.

Dower, by the common law, is the widow's life estate in a third part of the lands and tenements whereof her husband was seised of an estate of inheritance at any time during the coverture. Although the word is derived from the Latin, the Roman "marriage portion" (consisting of money, goods or lands), denominated *dos*, was brought by the wife to the husband. Provision out of the husband's estate for the sustenance of the widow and education and nurture of the children, seems to have originated among the ancient Germans, concerning whose customs TACITUS wrote: *Dolem non uxor marito, sed uxori maritus offert*. The same custom prevailed among the Goths, Visigoths and Burgundians, who applied it at first to chattels. As successive conquests insured the permanency of their land acquisitions, affection, with generosity of principles, prompted the extension of dower to land. Danish historians record the introduction of dower into their country by Sweyn, the father of Canute, in gratitude to the ladies who ransomed him with their jewels when a captive among the Vandals. Among the Saxons dower was limited to personalty. There are no traces of dower in English lands previous to the Norman Conquest. Sir MARTIN

WRIGHT considered it a branch of the Norman doctrine of fiefs or tenures. If so, it was no more than a local custom. It was no part of the primitive Feudal System, and had no feudal reasons for its invention; but was expressly introduced therein by the Emperor Frederick II, the contemporary of Henry III, of England. Before this reign, however, dower in lands in England was recognized. In course of time, from a mere interest in personalty dower was extended to a conditional allowance in one-half of the husband's lands. If the husband left children, dower was forfeited by incontinency or re-marriage of the widow. In the Introduction to the Great Charter of Henry I (A.D. 1101), it is provided: "If the wife survive her husband, and there be no children, she shall have her dower; but if there be children, she shall have her dower only so long as she lives chastely." During the reign of Henry II, the usual species of dower was dower *ad ostium ecclesia*, which was "where tenant in fee simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and troth plighted between them, doth endow the wife with the whole, or such quantity as he shall please, of his lands; at the same time speci-

fying and ascertaining the same; on which the wife, after her husband's death, may enter without further ceremony:" Co. Litt., 39; 2 Blacks. Com., 133. But the feudal restraints would not allow an endowment of over one-third part of the lands, and less than that was encouraged in the interest of the feudal lord. If no dower was assigned at the church porch, then the common law endowed the wife with one-third part of the lands and tenements of which the husband was seised at the time of the marriage. This was called *dos rationabilis*. If the husband possessed only personalty, and no agreement was made as to dower in realty subsequently to be acquired, the endowment in goods, chattels or money at the marriage was sufficient for all time. By *Magna Charta* common law dower was extended to the third part of all lands which the husband had held at any time during coverture, in these words: "But the third part of all the lands of which her husband was possessed in his lifetime, shall be assigned to her for her dower, except she has been endowed with less at the church door." Thereafter, if at any time during the coverture the husband became solely seised of any estate of inheritance in lands to which any issue, which the wife might have had, might, by possibility, have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed (by her in severalty) during the remainder of her life: Williams on Real Property, 6 Am. Ed., 232; 2 Blacks. Com., 131-134. In England, since January 1, 1834, a widow is not entitled to dower

out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will; she is only entitled to dower as against the heir-at-law, but not as against the devisee or the purchaser under any deed in which she has not joined. If the husband dies intestate, the wife has her dower in lands of which he was possessed, unless he had executed a declaration to the contrary: Statute 3 and 4 Williams IV, c. 105; Williams on Real Property, 6 Am. Ed. 232, 236, 237; 4 Kent's Com., 51.

Irrespective of statutory enactments and the common law method of barring dower by fine or common recovery, at common law, the right of dower, having once attached, adhered to the land notwithstanding a sale or devise by the husband, unless the wife's concurrence were obtained by a release of her dower, the familiar instance of this being her joining in the conveyance as a grantor or mortgagor. The common law of Pennsylvania permitted it to be barred by deed with separate acknowledgment, and this irrespective of the Act of February 24, 1770; Lloyd v. Taylor, 1 Dallas, 17. By legislative enactments in New Hampshire, Vermont, Connecticut, Delaware, Tennessee, Florida and Georgia, the widow has dower only in such lands whereof her husband died seised: Stimson's Am. Stat. Law, § 3202; Stewart v. Stewart, 5 Conn., 317; Combs v. Young, 4 Yerger (Tenn.), 218; Reid v. Campbell, Meigs (Tenn.), 388; Thayer v. Thayer, 14 Vt., 107. This is also the law in Scotland. In Maine, New Hampshire and Massachusetts, a widow has no dower in wild land, since it would be useless unless she

improved it: *Stimson's Am. Stat. Law*, § 3219; *Conner v. Shepherd*, 15 Mass. 164; *White v. Willis*, 7 Pick., 143; *Johnson v. Perley*, 2 N. H., 56. If the husband's alienee improve such land before his death, the widow has no dower in it, since her husband was seised of no estate therein of which she was dowable: *Webb v. Townsend*, 1 Pick., 21. This, however, is not the law in Pennsylvania: *Thompson v. Morrow*, 5 S. & R., 290.

By the common law of England a widow's right to dower was independent of the debts of her husband; but the contrary rule generally prevailing in the United States gives the rights of creditors precedence over the widow's dower: *Gardiner v. Miles*, 5 Gill, 94; *London v. London*, 1 Humph., 1. In *Combs v. Young*, 4 Yerger (Tenn.) 218, however, it was decided that the right of the widow to dower in the lands of which the husband died seised and possessed, is preferred to that of the husband's creditors. Statutes in North Carolina and Indiana have declared the widow's dower to be paramount to creditor's claims. In Pennsylvania the sale of lands upon judicial process against the husband, before or after his death, defeats dower therein: *Graff v. Smith*, 1 Dallas, 484; *Scott v. Croisdale*, 2 Id., 127. But nothing short of a judicial sale works an extinguishment. Thus an assignment by the husband expressly for the payment of debts will not bar his wife's dower: *Keller v. Michael*, 2 Yeates, 300; *Eberle v. Fisher*, 13 Pa., 526; *Helfrich v. Obermyer*, 15 Id., 113; *Worcester v. Clark*, 2 Grant, 87. A sale of the lands of a bankrupt by the assignee does not divest the dower of the bankrupt's

wife: *Lazear v. Porter*, 87 Pa., 513. In the same State dower is barred by a sale under a *levari facias* on a mortgage in which the wife did not join: *Scott v. Croisdale*, 2 Dallas, 127; *Killinger v. Reidenhauer*, 6 S. & R., 534; *Reed v. Morrison*, 12 Id., 21; by a sale under testamentary power for the payment of debts: *Hannum v. Spear*, 1 Yeates, 553; *Mitchell v. Mitchell*, 8 Pa., 126; and by a sale under authority of the Orphans' Court, though not by a sale under voluntary assignment for the benefit of creditors: *Helfrich v. Obermyer*, 15 Pa., 113; *Lazear v. Porter*, 87 Id., 513. The reason for the extinguishment of dower in these cases without judicial process against the wife is, that her right is subordinate to the rights of creditors; she is only entitled to the surplus after their claims are satisfied: *Mitchell v. Mitchell*, 8 Pa., 126, 127. The right of dower is a mere incident of the marital relation, and does not attach to the husband's estate for the purposes of enjoyment until all his debts are paid. Lands are assets for the payment of debts: *Directors of Poor v. Royer*, 43 Pa., 146, 153.

At the common law it was necessary that the husband be seised of a *legal* estate of inheritance, as distinguished from an equitable estate under Chancery liberality. Though the Court of Chancery allowed curtesy in the equitable estates of wives, it did not permit dower in the equitable estates of husbands: *D'Arcy v. Blake*, 2 Schoales & Lefroy, 388; *Chaplin v. Chaplin*, 3 P. Wms., 229, 234; *Smith v. Adams*, 5 De Gex, M. & G., 712; *Ransom v. Ransom*, 17 Fed. Rep., 331, 333; *Dubs v. Dubs*, 31 Pa., 149. The

legal title not being in the husband, a wife at common law had no dower in an equity of redemption: 4 Kent's Com., 43, 44; *Dixon v. Saville*, Br. Ch. Cas., 328; *Stelle v. Carroll*, 12 Peters, 201, 205; *Maybury v. Brien*, 15 Id., 21, 38. In the United States custom and legislation have generally permitted dower in the equitable estate of a husband. A contrary rule never existed in Pennsylvania: *Shoemaker v. Walker*, 2 S. & R., 534; *Reed v. Morrison*, 12 Id., 18; *Kelly v. Mehan*, 2 Yeates, 515; *Jones v. Patterson*, 12 Pa., 149; *Pritts v. Richey*, 29 Id., 71, 76; *Dubs v. Dubs*, 21 Id., 149; *Junk v. Canon*, 34 Id., 286. The common law rule was abolished by implication in Arkansas: *Blakeney v. Ferguson*, 20 Ark., 547; *Kirby v. Vantreece*, 26 Id., 368, 370, and expressly in England: Statute of 3 and 4 William IV, c. 105. In Alabama, *Harrison v. Boyd*, 36 Ala., 503; Illinois, *Greenbaum v. Austrian*, 70 Ill., 591; Kentucky, *Gully v. Ray*, 18 B. Mon., 107; Maryland, *Gleen v. Clark*, 53 Md., 580, 604; Missouri, *Duke v. Brandt*, 51 Mo., 221, 225; New Jersey, *Boyd v. Thompson*, 21 N. J. L., 58, 61; 22 Id., 543, 548; New York, *Hicks v. Stebbins*, 3 Lans., 39; *Johnson v. Thomas*, 2 Paige, 377; *Hawley v. James*, 5 Id., 318; North Carolina, *Klutts v. Klutts*, 5 Jones Eq., 80; Ohio, *Abbott v. Bosworth*, 36 Ohio St., 605; Virginia, *Blair v. Thompson*, 11 Gratt., 441; and in Rhode Island, Tennessee and West Virginia: *Stimson's Am. Stat. Law*, § 3212-17. The common law rule that dower attached only to legal estates, still exists in Connecticut, *Steadman v. Fortune*, 5 Conn., 462; Delaware, *Conroy v. Conroy*, 3 Del. Ch., 407; Georgia, *Day v. Solomon*, 40 Ga., 32; Maine,

Mann v. Edson, 39 Me., 25; *Kidder v. Blaisdell*, 45 Id., 461; Massachusetts, *Reed v. Whitney*, 7 Gray, 533, 538; Michigan, *May v. Sprecht*, 1 Mich., 187; New Hampshire, *Hobbinson v. Dumas*, 42 N. H., 296; Oregon, *Farnum v. Loomis*, 2 Ore., 29; South Carolina, *Secrest v. McKenna*, 6 Rich. Eq., 72; Vermont, *Jenry v. Jenry*, 24 Vt., 324, and in Florida and Wisconsin: *Stimson's Am. Stat. Law*, §§ 3213, 3214, 3215. At common law a widow is entitled to dower in the whole of land mortgaged or incumbered by the husband after marriage by a conveyance in which she had not joined, if not otherwise barred, except in those States where by statute she is only endowed of land whereof the husband died seised. In some States there are special statutory provisions to the effect that if the husband purchase land during coverture and give a purchase-money mortgage, she only has dower in the equity even though she did not join in the mortgage. In lands mortgaged before marriage the wife has dower, if at all, only in the equity of redemption, and statutes in Massachusetts, Maine, Vermont, New York, Illinois, Michigan, Wisconsin, Nebraska, Virginia, West Virginia, Arkansas and Oregon give her dower as against all but the mortgagee. Unless a husband mortgagee acquires an absolute estate in the mortgaged lands during coverture, the widow has no dower therein, notwithstanding statutory provisions, since a mortgage is considered as passing no title, or is deemed to be personalty: *Stimson's Am. Stat. Law*, *supra*. In the United States generally a mortgage is considered as a mere security for a debt, and the mortgagor legally as well as

equitably seized except as to the mortgagee and his assigns: *Barker v. Parker*, 17 Mass., 564; *Simonton v. Gray*, 34 Maine, 50; *Runyan v. Stewart*, 12 Barbour, 537. Therefore, should the husband release the equity of redemption, the wife is entitled at his death to her dower in the lands subject to the mortgage; if they are sold under the mortgage her claim is for dower in the surplus proceeds, if any there be: 4 Kent's Com., 44, 45; *Shoemaker v. Walker*, 2 S. & R., 554; *Reed v. Morrison*, 12 Id., 18; *Smiley v. Wright*, 2 Ohio, 507; *Crabb v. Pratt*, 15 Ala., 843; *Robinson v. Miller*, 1 B. Monroe, 91; *Barker v. Parker*, 17 Mass., 564; *Kortright v. Cady*, 21 N. Y., 343; *Slaughter v. Culpepper*, 44 Ga., 319; 5 Am. & Eng. Ency. of Law, 899, *et seq.* But common law dower has never existed, or has been abolished (other analogous estates existing in its place) in Arizona, California, Colorado, Dakota, Idaho, Indiana, Iowa, Kansas, Louisiana (where the civil law obtains), Minnesota, Mississippi, Nevada, Texas, Utah, Washington and Wyoming. In the other States it exists in a more or less modified form: thus in Connecticut, possession is substituted for seisin; in Alabama, the interest in one-half; in Arkansas, dower is given in personalty; in Missouri, in leaseholds; in Ohio, in remainders; in other States, as we have seen, it is allowable in equitable estates, and in some is confined to property of which the husband is seized at his death: *Stimson's Am. Stat. Law*, § 3202.

A widow could only have dower in an estate held in severalty or in common. She could not claim dower in a joint tenancy, since upon

the decease of a joint tenant the surviving tenants are entitled, under the original gift, to the whole estate, and its nature permits no intrusion: the husband is never solely seized: Co. Litt., 31, b; *Williams on Real Property*, 6 Am. Ed., 233; *Maybury v. Brien*, 15 Peters, 21, 37. When partition occurs between tenants in common dower attaches to the ascertained purport of the husband: *Potter v. Wheeler*, 13 Mass., 504; *Mosher v. Mosher*, 32 Maine, 412. The inchoate right of dower of the wife of a tenant in common is defeated by a sale in partition of the common property, although she is not a party to the proceedings: *Holley v. Glover* (S. C.), 16 L. R. A., 776.

While the estate must be one of inheritance, issue need not actually be born, though had the wife children they must have inherited. The husband must have seisin. There can be no dower in an estate for years: *Spangler v. Stanler*, 1 Md. Ch., 36; *Whitmire v. Wright*, 22 So. Car., 446; or in estates at will: 4 Coke, 22 a, 22 b. A wife can have no dower out of an estate in remainder expectant on an estate of freehold, since there is no seisin in the husband; though she is dowable of a reversion expectant on a term for years, as in that instance the husband is seized of the freehold: Co. Litt., 32 a; *Dunham v. Osborn*, 1 Paige, 634; *Green v. Putnam*, 1 Barbour, 500; *Otis v. Parshley*, 10 N. H., 403; *Eldredge v. Forestal*, 7 Mass., 253; *Blood v. Blood*, 23 Pick., 80. But the intestate laws of various States have modified in many instances the common law doctrines, and under their general language a widow may have her life estate in a vested remainder which

her husband owned at his death: Cote's Appeal, 79 Pa., 235, 237.

A noteworthy instance of equitable and statutory regulation of dower is seen in the application of the doctrine of *election*, which arises where the husband by will provides for his wife and devises to others the estate of which she is dowable. The widow is then to elect whether to claim her dower in opposition to the will, or renounce dower in acceptance of the devise: *Streatfield v. Streatfield*, 1 White & Tudor's Leading Cases in Equity, 3 Am. Ed., 480, note. In some of the United States, by statute, a widow is entitled to dower in addition to devises or pecuniary provisions in the will of her husband, if such plainly appears to have been his intention. In other States statutes provide that the acceptance of a devise bars dower: *Stimson's Am. Stat. Law*, § 3244. In Pennsylvania any devise or bequest is taken to be in lieu of dower (unless the testator's intention is otherwise), and the widow is put to an election: *Scott's Intestate Law* (Pa.), 2 Ed., p. 46, *et seq.* In *Leinaweaver v. Stoevers*, 1 W. & S. (Pa.), 160, it was held that the acceptance by a widow of her share under the interstate laws did not bar her from recovering dower out of land which her husband aliened in his lifetime. Generally, upon the determination of the estate, or avoidance of the husband's title, or because of a defect therein, or by the operation of collateral limitations, dower will be defeated: 4 Kent's Com., 49. Thus, where the grantor of an estate on condition enters for condition broken, the dower of the grantee's wife falls with his estate: *Beardslee v. Beardslee*, 5 Barb., 324. The wife's dower may be defeated by

every subsisting claim] or encumbrance, legal or equitable, which existed before the inception of title and whose effect is to defeat the husband seisin. An agreement to convey before dower attaches is enforceable in equity to the extinction of dower; if there has been an equitable conversion dower is regulated according to equitable principles: 4 Kent's Com., 50; *Greene v. Greene*, 1 Ohio, 535; *Crabtree v. Bramble*, 3 Atk., 680, 687.

Aside from the usual preventives of dower at common law (notably divorce *a vinculo matrimonii*—since *ubi nullum matrimonium, ibi nulla dos*—adulterous elopement, treason, alienage, levying a fine, or suffering a common recovery during overture), the Statute of Uses, 27 Henry VIII, c. 10, was potential in its influence. Previous to the statute the bulk of English landed interests were conveyed to uses. Though the equitable estate of the husband were a fee simple, the wife had no dower in it because the seisin was not in the husband but in the trustee. The necessity, therefore, arose to make some provision for the wife; and this was done, upon marriage, by settling a special estate to the use of husband and wife, for their lives, in joint tenancy, or *jointure*; the estate enuring to the benefit of the wife upon the death of the husband. When the Statute of Uses transferred the seisin from the trustee to the *cestui que trust*, the dower of every wife, *ipso facto*, attached to all the husband's lands and tenements, in addition to those settled in jointure. Accordingly the statute provided that upon making an estate in jointure dower should be barred. The statute expressly provided for a *legal jointure*, which Lord COKE defines as a com-

petent livelihood of freehold for the wife of lands and tenements, to take effect, in profit or possession, immediately upon the death of her husband, for the wife of the wife at least (and not *pur auter vie*), made, before marriage, to herself (and not to another in trust for her), and in express satisfaction of the whole of her dower: Co. Litt., 36 b; Vernon's Case, 4 Coke, 1. The jointure had to be made before marriage, as coverture prevented consent; or if made during coverture, the widow could ratify or reject it and elect to take her common law dower. The provisions of the Statute of Henry VIII. have been substantially reenacted or adopted in the United States: Alex. Br. Stat., 300, 301; Stimson's Am. Stat. Law, §§ 3241-3244. In 1787, New York adopted the statute *verbatim*, though subsequent legislation has imposed modifications: 4 Kent's Com., 56; Kennedy v. Nedrow, 1 Dallas, 415, 417; Hastings v. Dickinson, 7 Mass., 153; Ambler v. Norton, 4 Hen. & Munf. (Va.), 23.

By the common law, irrespective of the Statute of Uses, no provision or settlement made by a man before his marriage in favor of his intended wife could bar dower; nor could a woman be bound by an ante-nuptial release of her dower. It was a maxim of the common law that no right could be barred before it accrued, and, also, that no right to an estate of freehold could be barred by any manner of collateral satisfaction or recompense: Co. Litt., 36 b.; Vernon's Case, 4 Coke, 1. Even to this day, except under the provisions of the Statute of Uses or other legislative enactment, no settlement or agreement between intended husband and wife is *at law* a bar to dower. In *equity*, however,

jointures and ante-nuptial releases of dower are sustainable. Any reasonable provision, whether secured out of realty or personalty, which an adult person, previous to marriage and uninduced by fraud or imposition, agrees to accept in lieu of dower, will be a good jointure *in equity*, although it be wanting in the requisites of a *legal* jointure—and operate as a bar to any subsequent claim to dower: Dyke v. Rendall, 2 DeGex, M. & G., 209; Wentworth v. Wentworth, 69 Maine, 247; Heald's Petition, 2 Foster (22 N. H.), 265; Cole v. Amer. Bapt. Home Miss. Society (N. H.), 14 Atl. Rep., 73; Hastings v. Dickinson, 7 Mass., 153; Gibson v. Gibson, 15 Id., 106; Vincent v. Spooner, 2 Cushing, 467; Miller v. Goodwin, 8 Gray, 542; Tarbell v. Tarbell, 10 Allen, 278; Jenkins v. Holt, 109 Mass., 261; Freeland v. Freeland, 128 Id., 509; Deshon v. Wood, 148 Id., 132; Andrews v. Andrews, 8 Conn., 79; Boardman's Appeal, 40 Id., 169; M'Cartee v. Teller, 2 Paige, 511; Johnston v. Spicer, 107 N. Y., 185; Gorham v. Fillmore, 111 Id., 251; Ellmaker v. Ellmaker, 4 Watts, 89; Wilson's Estate, 2 Pa., 325; Withers v. Weaver, 10 Id., 391; Schoch v. Schoch's Exrs., 19 Id., 252; Talbot v. Calvert, 24 Id., 327; Withington's Appeal, 32 Id., 419; Renziehausen v. Keyser, 48 Id., 351; Russell's Appeal, 75 Id., 269; Phila. Trust Co.'s Appeal, 108 Id., 311; Neely's Appeal, 124 Pa., 406, and cases therein cited; Kesler's Estate, 143 Id., 386; Naill v. Maurer, 25 Md., 532; Busey v. McCurley, 61 Id., 436; Faulkner v. Faulkner's Exrs., 3 Leigh (Va.), 255; Charles v. Charles, 8 Grattan (Va.), 486; Findley v. Findley, 11 Id., 434; Beard v. Beard, 22 W. Va., 130; Cauley v. Lawson, 5 Jones' Eq.

(No. Car.), 132; *Brooks v. Austin*, 95 No. Car., 474; *Gelzer v. Gelzer*, 1 Bailey's Eq. (So. Car.), 387; *Lippman v. Boala*, 16 Lea (Tenn.), 283; *Martin v. Martin*, 22 Ala., 86; *Culberson v. Culberson*, 37 Ga., 296; *Brown v. Ransey*, 74 Id., 210; *Huguley v. Lanier*, 12 Southeastern Rep., 922; *Williamson v. Yager*, 15 Id., 660; *Stilley v. Folger*, 14 Ohio, 610; *Murphy v. Murphy*, 12 Ohio St., 407; *Mintier v. Mintier*, 28 Id., 307; *McNutt v. McNutt*, 116 Ind., 545; 2 L. R. A. (and note), 372; *Phelps v. Phelps*, 72 Ill., 545; *Jordan v. Clark*, 81 Id., 465; *McGee v. McGee*, 91 Id., 548, 551; *McMahill v. McMahonill*, 105 Id., 596; *Barth v. Lines*, 118 Id., 374; *McAnnulty v. McAnnulty*, 120 Id., 26; *Aultman v. Pettys*, 59 Mich., 482; *Logan v. Phillips*, 18 Mo., 22; *Gordon v. Eans*, 8 Western Rep., 600; *Mack v. Heiss*, Id., 203; *Collins v. Collins*, 72 Iowa, 104; *Bottomly v. Spencer*, 36 Fed. Rep., 732.

In *Johnston v. Spicer*, 107 N. Y., 185, 191 (1887), it was held that ante-nuptial contracts intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the Courts and will be enforced in equity according to the intention of the parties. In *Lant's Appeal*, 95 Pa., 279 (1880), a woman in contemplation of marriage obtained from her intended husband his verbal consent to her disposal of her property. The day before her marriage she executed a will whereby, after liberally providing for him, she bequeathed the residue of her estate to relatives, friends and charities. And it was held that, while according to the Pennsylvania Statute of April 8, 1833, marriage

revoked the will, it might, nevertheless, take effect in equity as an ante-nuptial settlement, and that on every principle of equitable estoppel the husband was prevented from objecting to its complete enforcement; *SHARSWOOD, J.*, applying the principle of equity that where a person has a legal right to dispose of property and intends to do so and the instrument to carry out this intention is at law ineffectual, the Courts will regard it as reformed and decree it to be such as it ought to have been effectually to carry out the intention. Ante-nuptial agreements between persons contemplating marriage, concerning their property, are favored: *Kesler's Estate*, 143 Pa., 386, unless advantage is taken of the confidence induced by the relation of the parties contracting: *Kline v. Kline*, 57 Pa., 120; *Shea's Appeal*, 121 Id., 302; *Pierce v. Pierce*, 71 N. Y., 154; or the alienation is in fraud of creditors' rights: *Magniac v. Thompson*, 7 Peters, 348; *Deshon v. Wood*, 148 Mass., 132; *Russell's Appeal*, 75 Pa., 269. Marriage alone is ample consideration: *Magniac v. Thompson*, 7 Peters, 348; *Deshon v. Wood*, 148 Mass., 132; *McNutt v. McNutt*, 116 Ind., 545, 548 *et seq.*; 2 L. R. A. (and note), 272; *Merritt v. Scott*, 50 Am. Dec., 373; *Hafer v. Hafer*, 33 Kan., 449, 460; *Gackenbach v. Brouse*, 4 W. & S. (Pa.), 546; *Bannan's Appeal*, 1 Walker (Pa.), 11; *Wind v. Haas*, 8 Pa. C. C. Rep., 645; 14 Am. and Eng. Ency. of Law, 544. In *Rahe v. Real Estate Savings Bank*, 96 Pa., 128 (1880), it was decided that an ante-nuptial release of dower applies to realty subsequently acquired unless it is expressly excepted from its operation. In *M'Cartee v. Teller*, 2 Paige, 511; 8

Wend., 267, it was held that a jointure on an infant before coverture bars dower, since it is a *provisio viri* for the wife's support and does not arise *ex contractu*; and, therefore, inability to consent is immaterial. But it has elsewhere been held that a widow may elect to ratify or reject an ante-nuptial contract made when an infant: 4 Kent's Com., 55, 56; Grogan v. Garrison, 27 Ohio St., 50; Shaw v. Boyd, 5 S. & R. (Pa.), 312; Wilson v. McCullough, 19 Pa., 77, 86, 87; Whichcote v. Lyle's Exrs., 28 Id., 73; Scott's Intestate Law (Pa.), 2 Ed., 494. In Rhode Island, Virginia, Ohio, Kentucky and Missouri a widow is privileged to claim her dower and waive an estate conveyed to her in lieu of dower when she was an infant or *feme covert*. Indeed, it is believed to be the general rule throughout the United States that to bar dower the woman's consent must be expressly given before marriage when she is *sui juris* and thoroughly acquainted with the nature of her rights and action: Williams on Real Property, 6 Am. Ed., 236, note 1.

The relations of the parties to an ante-nuptial release of rights which marriage would give them in the estates of each other, are those of strictest confidence; and while many courts have specially favored such contracts, they watch with careful eye lest the confidence be abused, and will set aside the contract, upon the ground of constructive fraud, if unfairness is apparent: Kline v. Kline, 57 Pa., 120; Pierce v. Peirce, 71 N. Y., 154; Darlington's Appeal, 86 Pa., 512, 518, *et seq.*; 31 W. N. C., 15; Shea's Appeal, 121 Pa., 302; Russell's Appeal, 75 Id., 268; Boyd v. De La Montagnie, 73 N. Y., 498, 502-3;

Huguenin v. Baseley, 14 Vesey, 273; 2 Tudor's L. C. Eq., 6 Eng. Ed., 597, 619; Hoghton v. Hoghton, 15 Beavan, 278.

In the leading case of Kline v. Kline, 57 Pa., 120, 122 (1868), Mr. Justice SHARSWOOD says: "There is, perhaps, no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm's length, we think is a mistake. Surely, when a man and woman are on the eve of marriage, and it is proposed between them . . . to enter into an ante-nuptial contract upon the subject of 'the enjoyment and disposition of their respective estates,' it is the duty of each to be frank and unreserved in the disclosure of all circumstances materially bearing on the contemplated agreement. It may, perhaps, be presumed, in the first instance, that such disclosure was made; but any designed and material concealment ought to avoid the contract at the will of the party who has been injured." The confidential relation requires *uberrima fides*—the parties must deal upon the basis of good faith, mutual confidence and equality of condition.

This statement of a celebrated jurist has received the endorsement not only of subsequent decisions in Pennsylvania, but those in other States; the latest case being, ap-

parently, Pulling's Estate, Lothrop's Appeal, decided by the Supreme Court of Michigan, on October 4, 1892, the facts of which appear *ante* p. 831.

The facts in *Kline v. Kline*, *supra*, were these: A contract (reciting an intended marriage, which occurred shortly afterward), was made by which the woman was to retain her estate, and if she became a widow was to have thereafter, for life, a certain portion of the dwelling-house and \$40 annually from her husband's estate. Seventeen years after the marriage the husband died, possessed of an estate worth \$15,000, beside the dwelling-house; and his widow sought to have the ante-nuptial contract declared invalid, because of misrepresentations as to his estate, which induced her to sign the contract for an inadequate consideration. It was contended that the woman should have availed herself of opportunity for information, and if she neglected it, she was in fault. But it was held by SHARSWOOD, J., that this "would be revolting to all the better feelings of woman's nature. To have instituted inquiries into the property and fortune of her betrothed, would have indicated that she was actuated by selfish and interested motives. She shrank back from the thought of asking a single question. She executed the paper without hesitation and without inquiry. She believed that he would propose nothing but what was just, and she had a right to exercise that confidence:" 57 Pa., 123. An auditor subsequently found, as a fact, that upon the day of the execution of the contract, three-fourths of the man's property was concealed from the woman. He held that the facts presented a

strong case of constructive, if not actual fraud, and upon failure of affirmative proof that the man performed his duty and acted in fairness, allowed the widow her rights in the estate, irrespective of the ante-nuptial contract. In sustaining the decision, SHARSWOOD, J., said: "While it might not be necessary to show affirmatively that there was a full disclosure of the property and circumstances of each, yet if the provision secured for the wife was unreasonably disproportionate to the means of the intended husband, it raised the presumption of designed concealment, and threw upon him the burden of disproof:" *Kline's Estate*, 64 Pa., 122, 126; *Tiernan v. Binns*, 92 Id., 248, 252; *Bierer's Appeal*, Id., 265; *Ludwig's Appeal*, 101 Id., 535; *Smith's Appeal*, 115 Id., 319; *Shea's Appeal*, 121 Id., 302; *Neely's Appeal*, 124 Pa., 406; *Campbell's Appeal* (a case of post-nuptial settlement), 80 Id., 298, 309.

In *Bierer's Appeal*, 92 Pa., 265 (1880), it appeared that in consideration of five dollars to be paid thirty days after the death of Everhart Bierer, his betrothed, by ante-nuptial contract, agreed to release all right and claim to all the real and personal estate, including money, of which he may die seized or possessed. At that time the man was worth \$60,000, and the woman without property or means of support. It was held, per MERCUR, J., that "this paltry sum of five dollars was manifestly so unreasonable, and disproportionate to the value of his property, as to raise the presumption that he designedly concealed from her the value thereof. . . . In the absence of any evidence showing he made a statement to her of any sum that he was worth,

we cannot presume that she would have accepted such a nominal sum had she been fully and truthfully informed." 92 Pa., 266. In Ludwig's Appeal, 101 Pa., 535 (1882), a wealthy widower of fifty-seven years of age, who had eleven children, and a destitute widow of sixty-three years, being about to marry, executed an antenuptial contract, whereby the woman, in consideration of "one dollar and a comfortable support during her life and at her death a decent Christian burial," relinquished all her rights in the man's estate. The agreement recited that the man owned "certain lands and tenements, also personal property;" the scrivener explained the effect of the instrument to the woman before execution, and stated that her intended husband "had a large property," but the extent or value of it was not communicated to her. Its value exceeded over \$14,000. Upon the decease of her husband fourteen years after the marriage, it was held that the circumstances indicated the absence of fraudulent concealment on the man's part in procuring the consent of the woman to the ante-nuptial settlement, the consideration was ample, and the widow was not entitled to \$300 exemption contrary to the terms of the contract: following *Tiernan v. Binns*, 92 Pa., 248. In *Smith's Appeal*, 115 Pa., 319; 19 W. N. C., 187 (1887), it appeared that by antenuptial agreement a woman released her dower in her intended husband's estate upon his setting aside a certain property for her use, assessed at \$12,500. A month afterward the parties married. The husband died seventeen years afterward, leaving an estate appraised at \$400,000, and bequeathing his wife

the interest of \$15,000 for life. When married, he was worth \$175,000 and had six adult children, by a former wife. It was held, per *PAXSON, J.*, that the provision in the settlement was not so disproportionate to the man's means as to create a presumption of fraud and concealment, 115 Pa., 324. In *Shea's Appeal*, 121 Pa., 302; 22 W. N. C., 328 (1888), the facts were these: Thomas Shea, a widower seventy years old, with several adult children, stated to his affianced, Susan Murphy, a widow of mature years, that he was worth from \$75,000 to \$80,000, but he was unwilling to allow his intended wife to have more of his estate than a good home and \$30 a month if she survived him. He suggested that a lawyer draw an agreement to that effect, which she indignantly opposed. Two days afterward, and about an hour before the parties were married, an attorney employed by Shea appeared with a contract which the couple signed with their marks, by which the woman relinquished her dower and all interest in the estate of her intended husband in consideration of \$30 to be paid her monthly after his death, the sum to be a charge on his realty. The woman was illiterate, and there was no proof (before the master in an equitable proceeding after the husband's death by the widow for the assignment of her dower) that the contract was explained to the woman or that her previous determination not to sign such an agreement was changed; but there was proof that she regarded the paper as a precaution against any advantage which might be taken of her by her stepchildren. The Supreme Court held that the widow was entitled to

dower, and the ante-nuptial settlement was accordingly set aside, GREEN, J., saying: "The proof scarcely amounts to evidence of a positive misrepresentation of the contents of the paper, but it is persuasive of a mistaken conception of it on her part." 121 Pa., 321. In Neely's Appeal, 124 Pa., 406; 23 W. N. C., 336 (1889), the appellant sought to have invalidated an ante-nuptial agreement executed by her and Robert Neely a few days before marriage, by which he relinquished all claim upon her estate and covenanted to allow her \$600 per annum after his death in full of all claim upon his estate. The contracting parties were cousins. He was 60 years old, had previously been married twice and had children by either wife. The appellant was 50 years of age and had never been married. Her estate equaled \$12,000, while that of Mr. Neely was several times larger. The contract was prepared by Mr. Neely's lawyer; and a few days before the marriage, when public announcement of the wedding had been made, Mr. Neely took it to his betrothed, who objected, amid tears, to signing it; he then said: "If you don't sign it there will be no wedding." Several hours later she signed the paper, after her nearest relatives—an uncle and two brothers (one of whom was named as trustee in the settlement)—were called in and after the paper was read and explained; but no disclosure appeared to have been made by either as to the extent of their individual estates, nor did the woman ask for advice. Ten years after the marriage the husband died, providing in his will for the payment of the annuity of \$600, and leaving his wife, in addition, the mansion house and

furniture so long as she cared to use the same. The widow sought to set aside the ante-nuptial contract as being in fraud of her rights as widow and having been extorted unwillingly. The Common Pleas found there was neither actual nor constructive fraud in the execution of the contract, and refused to set it aside. In affirming this decision, PAXSON, C. J., said: "Was the provision which Mr. Neely made for his intended wife so disproportioned to his means as to create a presumption of fraud or intended concealment? That the appellant knew when she signed the paper that he was a man of large means, is clear from the fact that she objected to it on the ground of its meanness. When we consider the question of the adequacy of the provision we must regard all the circumstances surrounding the case. This was a marriage between persons well advanced in years. The appellant was not the mother of his children, nor was she likely ever to bear him any. She had not in any way aided him to accumulate his fortune. She had \$12,000 of her own, all of which he relinquished. In addition he gave her \$600 per year during her life. What claim had this old woman, marrying this old man, to come in and take one-third of his estate away from his children and yet retain the whole of her own? She would, of course, have had a legal claim had he married her without an ante-nuptial contract; but she had no claim which made it inequitable or unjust in him to insist upon the execution of the contract before the marriage. It would have been a wrong to his own blood if he had not made some such arrangement. It was not a liberal

provision, but it was adequate. She retains all of her own estate, and has now in addition \$600 per year, besides a comfortably furnished home. Surely her last condition is better than her first. There is a marked distinction between this case and that of a young couple just entering upon the voyage of life. In the latter instance they grow up together; the wife is the mother of his children; she shares his burdens in his early struggles, and often by her thrift and economy aids him in the accumulation of his fortune. To cut off such a wife with a mere support during life would be as unjust as it would be ungenerous. But when a man in the decline of life, who has been twice a widower, and who has two sets of children, for the third time leads a woman to the altar, and an elderly woman at that, it is very different. In such case the wife reaps where she has not sown, and if she is provided with a comfortable support after her husband's death she has no just cause of complaint. In any event, if she is dissatisfied she ought to refuse to sign the contract, and not accept its benefits during her husband's life, and then seek to repudiate it after his death." 124 Pa., 426-7. STERRETT, J., dissented. In Kesler's Estate, 143 Pa., 386; 29 W. N. E., 15 (1891), it was held that where an intended wife, knowing her rights and informed of the situation, deliberately releases all her interest in her husband's estate in consideration of an ante-nuptial settlement, there must be two witnesses, or the equivalent, to show that a fraud was practised upon her in the execution of the contract. Such an agreement can only be revoked for a meritorious con-

sideration. The fact that the wife, after having voluntarily estranged herself from her husband's because of her dissatisfaction with the ante-nuptial agreement, came back to him, is not sufficient consideration for a revocation of the agreement; neither is the abandonment of legal proceedings for such revocation sufficient consideration. (But see Burkholder's Appeal, 105 Pa., 31.) STERRETT, J., held there was no apparent reason why the law should regard with disfavor the ante-nuptial agreement. "Mr. Kesler was advanced in years, had already accumulated a fortune, and had a family by a former marriage; while Mrs. Davison was lifted out of poverty and comfortably provided for by it. Persons situated as they were do not usually act from mere impulse, or contract without consideration. . . . A full disclosure was made to the intended wife, and every opportunity afforded her either to obtain information as to the nature and character of the instrument she came prepared to execute, or object to its execution if ignorant of its contents or deceived as to its purpose and object. She was not illiterate, but intelligent and well educated. She was not young, but of mature years and acquainted with marital rights and duties."

In *Pierce v. Pierce*, 71 N. Y., 154, an ante-nuptial contract, whereby in consideration of \$500 to be paid the intended wife if she survived her husband, she covenanted to release her dower and interest in his personal estate, was set aside, it appearing that at the time of executing the contract the man was possessed of realty, valued at \$25,000, and the bride assented to the contract under the erroneous understanding that

she was to receive \$500 in cash, a deed of a house and lot, in addition to the \$500, to be paid if she survived the husband; and the husband intentionally permitted her to remain in ignorance of the real terms of the contract. MILLER, J., said: "Antenuptial contracts whereby the future wife releases her claim to her right of dower and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition, they will be enforced by the courts. The surrender and release of rights to be acquired by the intended wife by the marriage relation must, however, be regarded with the most rigid scrutiny; and courts will not enforce contracts of this nature against the wife where the circumstances establish that she has been overreached and deceived, or been induced by false representations to enter into a contract which does not express or carry out the real intention of the parties. The relationship of parties who are about to enter into the married state, is one of mutual confidence, and far different from that of those who are dealing with each other at arm's length. This is especially the case on the part of the woman; and it is the duty of each to be frank and unreserved when about to enter into an ante-nuptial contract, by a full disclosure of all facts and circumstances which may in any way affect the agreement. . . . The courts require strict proof of fairness, when called upon to enforce an ante-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust, and unreasonably disproportionate to the means of the husband. The

rule undoubtedly is, that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement. It is also a well settled principle that a court of equity will interpose its power to set aside an instrument executed between parties who stand in confidential relations, when there is evidence showing fraud, or even when it appears that undue influence has been exercised, when one party is so situated as to exercise a controlling influence over the will, conduct, and interests of the other:" 71 N. Y., 157-9.

In *Andrews v. Andrews*, 8 Conn., 79 (1830), it appeared that in consideration of contemplated marriage between a man and woman aged 74 and 73 years respectively, and possessed of large estates, the parties individually agreed to release all interest which otherwise would accrue in the estate of the other upon marriage. It was held, that in the absence of misrepresentation, or abuse of confidence, the release of the woman was valid; and the inadequacy of consideration no ground for contention, since marriage itself was a valuable consideration, and such agreements are eminently to be favored by courts of equity.

In *Tarbell v. Tarbell*, 10 Allen (Mass.), 278 (1865), an ante-nuptial contract, between a man of 84 years and a woman of middle age, whereby she released her dower in consideration of marriage and \$1,000 in stock, was sought to be set aside by her upon her husband's death two years after marriage, upon the ground that she signed immediately

before marriage, and under excitement of mind, without time for examination, and understanding it to be a mere receipt for the stock which she had previously accepted as a gift. But HOAR, J., said: "We find no reason to doubt that she entered into the agreement with a full understanding of its force and effect; that it was made without fraud or misrepresentation on the part of her husband; was a reasonable one under all the circumstances, supported by an adequate consideration, and that it has been fully performed on his side." 10 Allen, 280. See, also, *Sullings v. Richmond*, 5 Id., 187. In the recent Massachusetts case of *Peaslee v. Peaslee*, 17 N. E. Rep., 506 (1888), upon a writ of dower, it was held, that demandant's testimony, that being about to execute an ante-nuptial contract before she read it through she said to her promised husband, "I suppose it is just as you talked," and he said, "Yes;" that she believed him, and signed without other knowledge of the contents; while in fact the provision made for her was not what he had promised in the talk referred to, was sufficient to warrant a finding that she signed by fraudulent representation. Such being the case it was invalid, and her coverture prevented a ratification.

In *Peck v. Peck*, 12 R. I., 485 (1880), an ante-nuptial contract was made shortly before the marriage of persons who had previously cohabited, and as a prerequisite to the ceremony, by which the parties mutually released all claim arising from the marriage to the property of either. The intended husband had considerable personalty, but little realty; the intended wife had little personalty, but expected to in-

herit some realty. In sustaining the agreement, after the death of the husband, DUFFRE, C. J., said: "When we consider that the marriage would give her no right in her husband's personalty of which he could not deprive her, and that he might possibly become entitled to curtesy in the estate that she was expecting to inherit, we think it cannot be said that the contract was without any adequate consideration or that it was grossly inequitable or unjust;" 12 R. I., 487-8.

In *Busey v. McCurley*, 61 Md., 436 (1883), the facts were these: By an ante-nuptial settlement between a widower with several children and a widow with one child, it was covenanted that the intended wife, if she survived the husband, should receive at his death one dwelling house, to be vested in her absolutely, in lieu of dower or distributive share of his estate. The marriage proved unhappy and by will the husband disposed of his entire estate, consisting principally of \$100,000 worth of realty, undertaking therein to discharge the obligation in the marriage contract by devising her an insignificant dwelling house, subject to an annual ground rent of \$64, which she renounced. Upon a bill filed after the husband's death it was held that the complainant could renounce the devise, and was entitled, under the covenant, to receive from the husband's estate a dwelling house suitable to his pecuniary circumstances and position in society, or could receive a money equivalent, since the specific execution of the covenant would be attended with difficulty.

In *Barth v. Lines*, 118 Ill., 374 (1886), a widower of forty-seven years, who had nine children, the owner of 1,000 acres of land worth

over \$80,000, and possessed of personality valued at over \$1,500, a few days before his marriage with a widow, entered into an agreement with her, in contemplation thereof, marriage being the consideration, whereby they mutually released individual claims arising by marriage in the estate of either. Nine years after marriage the husband died, and the widow claimed dower; but as it was shown the woman had conducted a store in her own right, and the marriage was a business arrangement; and it was proved that the woman fully understood the meaning and effect of the ante-nuptial contracts, he was debarred of dower. In a very recent case in Illinois, *Achilles v. Achilles*, 28 Northwestern Rep., 45 (1891), the facts were that three days before the marriage of a widower of 77 years and a widow 64 years, an agreement was executed whereby they mutually released claims to each other's estate, and the widow, should she survive him, was to receive during widowhood the use of a portion of a house and \$200 per annum payable from his estate. Four years later the husband died, and the widow claimed her dower, alleging the invalidity of the ante-nuptial contract because of misrepresentations inducing its execution, and unreasonableness of its provisions. When the parties were married he was worth \$20,000 and she had a dower income of over \$500 per annum, and lived on \$3 a week. The Court held that misrepresentations were not proved, and that the provision for the widow, in view of the circumstances, was not unreasonable. *MAGRUDER, J.*, said: "The parties to an ante-nuptial contract stand in a confidential relation to each other, which requires good

faith and full disclosure, and the absence of unreasonable and harsh provisions. But in this case the whole arrangement seems to have been of a purely business character. . . . The ante-nuptial contract and the proposition to marry were presented simultaneously, and the latter was not accepted until the former was agreed upon. . . . It cannot be said that she was prevailed upon by the love and confidence growing out of a marriage engagement to sign the contract when she positively refused to sign it until her son had examined it and had advised her in regard to it."

In *McNutt v. McNutt*, 116 Ind., 545; 2 L. R. A., 372 (1888), it was held that where, in consideration of marriage, persons of mature years, after consideration and deliberation, without fraudulent inducement, sign an ante-nuptial release of the interests marriage would give them in the estates of each other, it is valid if not unreasonable in its terms. *ELLIOTT, J.*, said: "It was no more than equitable that the prospective husband should, at the time he made the contract, provide that his estate should go to his children by a former wife. It is, indeed, difficult to find any principle upon which courts can set aside contracts made in good faith, with due deliberation, and by persons of mature age, even though that contract be one between a man and woman contemplating marriage. It is stretching. . . . the power of the courts a great way to declare that a man and woman may not, even though the latter has no estate of her own, make their own contracts." 116 Ind., 549.

In *Jacobs v. Jacobs*, 42 Iowa, 600 (1876), a crippled widower, 62 years

old, who had 11 children and realty worth \$12,000, and a widow with 3 children, 40 acres of land and \$700 or \$800 in money, entered into an agreement preceding their marriage stipulating that "each is to have the untrammelled and sole control of his or her property, real and personal, as though no such marriage had taken place. The couple afterward had two children and lived together eight years, unhappily because of the children by their former marriages. Upon the husband's death the widow claimed her dower, but DAY, J., held the contract was fair and reasonable, the advantages obtained by the parties equal, and it was enforceable in the absence of fraud and imposition: 42 Ia., 607. In *Peet v. Peet*, 46 Northwestern Rep., 1051; 81 Iowa, 172 (see *Peet's Estate*, 79 Id., 185), an ante-nuptial agreement provided that the parties thereto should not in any manner be restricted in the control or disposition of their respective properties; that the woman thereby released all right of dower and in lieu thereof should receive, in case she survived her husband, the interest of \$3,000 per annum during widowhood. The parties were over 50 years of age, the man a widower with 3 children and worth about \$50,000; the woman without property and dependent upon her brother and her personal earnings for support. The parties had previously been neighbors for 25 years. Upon the husband's death the widow claimed dower, alleging that the husband took advantage of the confidential relation existing between them, by undue influence she signed the contract, and that it is unfair, unconscionable and void. After finding that there was no influence exerted, GIVEN,

J., said: "In view of all the circumstances, we do not think the agreement is so unreasonable as to show undue influence. Mrs. Peet had not contributed to the accumulation of the estate and was not likely to aid in its enhancement. She was without a home or means of support of her own, except her earnings. Her ability to earn a living would decrease with increasing years. By this agreement and marriage she was assured of a home, support and companionship with the man of her choice, and the interest on \$3,000 after his death, so long as she remained his widow. Meager as this provision is, yet it was reasonable that in her circumstances she should be willing to accept it. The circumstances did not call for special liberality on the part of Mr. Peet. It was reasonable that he should desire that no part of his estate should pass to strangers, through his wife, to the prejudice of his children:" 81 Ia., 177-8.

In *Hafer v. Hafer*, 33 Kan., 449 (1885), it appeared that a widower, who had seven adult children and one minor, and possessed of property worth \$14,000, on the day of his marriage and preceding it, entered into a contract with his affianced, who was 26 years of age, and possessed two cows and \$40, whereby they mutually agreed to enjoy and control their individual property, and upon the husband's death the wife should receive a share of his estate equal to that of any of his children. Three years afterward the husband died, worth \$19,000, and the widow sought to have the ante-nuptial contract held invalid as unjust, unreasonable and uncertain in its provisions. The Court, however, held that agreements of this kind were favored,

and should be liberally interpreted in effectuating the intentions of the parties, if entered into in good faith, by persons competent to contract, and the terms were not unreasonable, considering the circumstances of the parties at the time of contracting. In this instance the husband properly made provision for the children of his first wife; the provision for the wife was fair and highly equitable, and no evidence appeared that the conversation and conduct preceding the transaction were other than open, honest and fair, and no objections were raised then or afterwards. "The mere fact that he may not have disclosed his assets and liabilities in detail to her, will not, in the absence of anything showing fraud or deceit, invalidate the contract, nor will it raise a presumption of fraudulent concealment; and especially is this so where the terms and provisions of the contract are so manifestly fair and reasonable as in this case." *per* JOHNSTON, J., 33 Kan., 459-462.

In *Woodward v. Woodward*, 5 Sneed, (Tenn.), 49 (1857), immediately preceding the marriage of a widower, aged 73 years, and an illiterate widow of 45 years, an agreement was executed, reciting the contemplated marriage, and allowing the widow, should she be the survivor, the loan of two negro men for life in satisfaction of all claim to his estate. There being circumstances tending to show imposition by the husband, the widow, upon the husband's death, was permitted to disregard the settlement and accept her dower and distributive portion of his estate.

In *West v. Walker*, 77 Wisc., 557 (1890), it appeared that two months preceding the marriage of a wid-

ower of 85 years, the father of several children, with a widow of 61 years, who had previously been twice married, the woman released her dower, in consideration of marriage and \$1,000 upon the husband's death, if she survived. The woman had known the man for twenty years, and was destitute of property and means of support, except the use of a house and lot. When the man died he was worth \$25,000, and the widow sought to set aside the agreement; but it was held that the facts, together with her omission to make inquiries when signing the agreement, repelled any claim that she was ignorant of its effect. In this case the contract had been lost and destroyed, but it was satisfactorily proved by oral evidence, and effectually barred her dower. (See, also, *Wilson v. Holt* (1887), 83 Ala. 528). In *Spencer v. Boardman*, 6 W. Rep., 700 (Ill., 1886), dower was denied a widow upon the protest of heirs who alleged she had waived it by ante-nuptial agreement whose contents were proved by oral evidence after it appeared the widow refused to produce it upon notice, though she claimed it was signed as she was going on the floor to be married, did not read the paper or know what it was, and that it was subsequently destroyed by mutual consent. (See *Smith v. Linn*, 4 Pennypacker, Pa., 479; *Gangwere's Estate*, 14 Pa., 417. In *Hunt's Appeal*, 100 Pa., 590, 597 (1882), it was held that the existence of an oral ante-nuptial agreement should not be found save upon clear and convincing proof. The burden of proof is on those who aver its existence, and they must do more than show a slight preponderance of testimony;

they must adduce that which will be satisfactory when considered with the counter-testimony. A parol ante-nuptial settlement concerning chattels is valid: *Gackebach v. Brouse*, 4 W. and S. (Pa.), 546. An ante-nuptial release of dower must be in writing: *McAnnulty v. McAnnulty*, 120 Ill., 26.

This lengthy consideration of the subject of DOWER has, doubtless, shown the gradual yet determined methods adopted to modify considerably (and, at times, defeating) a right which by the common law partook of the nature of an indefeasible estate in a woman upon her marriage. Ante-nuptial releases of dower—so inconsistent with common law principles—are now greatly favored, especially if the contract be executed by old persons who have passed the fruitful days of connubial association. If the understanding were not induced by misrepresentations or advantage taken of the confidential relation of

the persons contracting in view of their impending marriage, the release is effectual to bar dower, unless the provision for the widow is unreasonable. This unreasonableness depends not so much on the value of the husband's estate as upon the circumstances surrounding the woman previous to her marriage. If the provision for a widow is not incompatible with her ante-nuptial surroundings and she agrees to accept it understanding the advantages the impending marriage allows her, she shall not claim her dower upon the decease of her husband. Though she in terms absolutely, knowingly and unconstrainedly release her dower before marriage, as in *Pulling's Estate*, *Lothrop's Appeal*, *ante* p. 831, yet the Courts are disposed to permit inconsistent declarations of the husband to be effectual in enlarging the widow's portion to harmonize with the real intentions of the parties.

ALFRED ROLAND HAIG.

DEPARTMENT OF MUNICIPAL CORPORATIONS
AND PUBLIC LAW.

EDITOR-IN-CHIEF,

HON. JOHN F. DILLON, LL.D.

Assisted by

LEWIS LAWRENCE SMITH,

CLINTON ROGERS WOODRUFF.

PEOPLE EX REL. CARTER *v.* RICE, SECRETARY OF STATE.¹
COURT OF APPEALS OF NEW YORK.

SYLLABUS.

A constitutional provision, which requires the senate districts to contain, as nearly as may be, an equal number of inhabitants, and that the members of the assembly be apportioned among the several counties, as nearly as may be, according to the number of their respective inhabitants, necessarily vests a discretion in the legislature in making the apportionment, and it will not be interfered with by the courts unless it is plainly and grossly abused.

In deciding whether or not the legislature has abused its discretion, the Court will consider all the circumstances which make it difficult to agree on an apportionment, such as local pride, commercial jealousy and rivalry, diverse interests, misapprehension of the real interests of different localities, and other conditions which might make a compromise necessary in order to accomplish any result.

The mere fact that in apportioning the members of the assembly the legislature, after giving to each county the full number to which its population entitles it, do not apportion the extra members to those counties having the largest surplus over the ratio of representation, but award them in some instances to those having a less surplus, does not show such an abuse of legislative discretion as will warrant the Court to declare the act invalid; at least when there is nothing to show that the legislature was influenced by improper considerations, and when the next United States census shows an increased population in those counties.

In determining whether an Apportionment Act is unconstitutional, because of inequalities between population and representation, the Court may consider the results which may follow a decision against the Act, such as the fact that any Apportionment Act may be brought before the Court for review, that greater inequalities exist in the next preceding Apportionment Act, which is yet more at variance with the Constitution than the one under discussion, and that if both these are declared unconstitutional the only remaining Apportionment Act would be one over a quarter of a century old, and therefore unfit to apply to present conditions of population.

¹ Reported in 31 N. E. Rep., 921. Decided in October, 1892.

STATEMENT OF FACTS.

The New York Constitution (Art. 3, Sec. 4) provides that "an enumeration of the inhabitants of the State shall be taken under the direction of the Legislature in the year 1855, and at the end of every ten years thereafter; and the said districts shall be so altered by the Legislature at the first session after the return of every enumeration that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and persons of color not taxed; and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators." Section 5 of the same article provides for 128 members of Assembly, and then continues: "The members of Assembly shall be apportioned among the several counties of the State by the Legislature, as nearly as may be, according to the number of their respective inhabitants, excluding aliens, and shall be chosen by single districts. . . . The Legislature, at its first session after the return of every enumeration, shall apportion the members of Assembly among the several counties of the State, in manner aforesaid, etc."

The Apportionment Act of 1892 (Laws, 1892, C. 397) exhibited some marked discrepancies in regard to the senatorial districts. The proper ratio was 180,899; but one district contained a population of 241,138, and another contiguous thereto only 105,720; yet both of these were in the city of New York, where, if anywhere, equality of apportionment could have been reached. A number of other districts also varied from the ratio by from 30,000 to 49,000. In the apportionment of assemblymen among the various counties there were also some notable discrepancies. Albany, with a population of 156,748, was given 4 members, while Monroe, with 181,230, was only allotted 3; and Rennselaer, with 121,679, and Queens, with 123,974, were each given the same number as Monroe. Dutchess, with 75,078, was given two members, but St. Lawrence, with

80,679, and Chautauqua, with 73,884, were each allotted only one. These rather glaring discrepancies, however, are explained by the fact that when the assemblymen were apportioned among the counties by the integral ratio of population, there was a surplus of eleven not allotted, and these, instead of being given in strict order to those counties having the largest surplus over the ratio, were apportioned arbitrarily. The four having the highest surplus, however, received an extra member, and it would also appear that the Act as originally reported followed the strict mathematical method in apportioning the extra members to the counties having the highest surplus; but that the variations thereafter made were due to necessary compromises during its passage.

The Board of Supervisors of Monroe County having refused to district the county for the election of the three members of Assembly allotted to it, alleging as a reason for their refusal that the Act was unconstitutional, Charles F. Pond, a citizen of the county, applied to the Special Term of the Supreme Court for a writ of *mandamus* to compel the Board to district the county. This was denied in a long and careful opinion by RUMSEY, J., on the ground that the action of the supervisors was proper, because the Legislature had overstepped the limits of its discretion in making the apportionment,¹ and this decision was affirmed by the General Term,² MACOMBER, J., dissenting on the ground that the errors were not serious enough to vitiate the Act.

At about the same time the validity of the same Act was called in question in Oneida County on an application for a *mandamus* to the Secretary of State to compel him to issue the statutory notices under the Apportionment Act of 1879; but the application was denied on the ground that the Court had no power to interfere with the discretion of the Legislature, as expressed in the Act of 1892.³

¹ *Peo. ex rel. Pond v. Board of Supervisors of Monroe County*, 19 N. Y. Suppl., 978.

² *Id. v. Id.*, 20 N. Y. Suppl., 97.

³ *Peo. ex rel. Carter v. Rice, Secretary of State*, 20 N. Y. Suppl., 293.

Both cases were taken to the Court of Appeals, and judgment was there rendered in accordance with the syllabus previously given, affirming *Peo. v. Rice*, though on different grounds from those taken by the Supreme Court, and reversing *Peo. v. Board of Supervisors*.

GERRYMANDERING.

This word, in which, by a curious etymological freak, the memory of Mr. ELBRIDGE GERRY, one time Governor of Massachusetts, is most unjustly held up to the contempt of posterity, embalmed as neatly and as imperishably as a fly in amber, has been the theme of much discussion of late in the courts of several of the United States. The evil which it names has become so pronounced and prevalent that, as one judge has very tersely said, it is high time to put a stop to it. The only question is, Have the courts the necessary power?

It has been very strenuously urged that the judiciary has no power to review the acts of the legislature in apportioning its own members, that being a matter peculiarly within its own powers, and being a political, not a legislative act. This question, however, may be regarded as finally set at rest by the able arguments of ORTON, J., in the first Wisconsin Gerrymander Case, 81 Wis., 440; s. c. 51 N. W. Rep., 724, where he shows conclusively that not only have the courts themselves almost uniformly asserted this right, but that the legislatures of several States have sanctioned this assertion by requesting the opinion of the justices on matters relating to apportionment: See *State v. Dudley*, Ohio St., 437; *State v. Newark*, 40 N. J. L., 297; *State v. Van Dwyne* (Neb.), 39 N. W. Rep., 612; Opinions of Justices,

3 Me., 477; 18 Me., 458; 43 Me., 587; 7 Mass., 523; 15 Mass., 537; 3 Pick. (Mass.), 517; 23 Pick., 547; 6 Cush. (Mass.), 575; 10 Gray (Mass.), 613; 142 Mass., 601; a. c. 7 N. E. Rep., 35; and of CASSODAY, J., in the Second Wisconsin Gerrymander Case, *State ex rel. Lamb v. Cunningham*, Secretary of State, 53 N. W. Rep., 35; as well as by the assumption of that fact in the cases hereafter cited. The dictum of the Court in *Wise v. Bigger*, 79 Va., 269, that laying off and defining Congressional districts is the exercise of a political and discretionary power, for which the legislature is amenable to the people, and that in 18 Me., 460, where the Court held that "if such power should be abused in any case, the remedy is with the people. Those guilty of any such outrage will be likely to become in time the victims of their own misconduct. In popular governments this, and the right which it may be believed the people will exercise of displacing bad servants, are great checks upon the abuse of power;" cannot prevail against such a weight of authority. And it is well that they do not represent the current of judicial opinion; for while they, especially the latter, evince a praiseworthy confidence in the readiness of the people to rebuke the misuse of legislative power, they also exhibit a peculiar blindness to the actual course of human events. "It is a condition, not a theory,"

that confronts the Court that has to deal with this question of gerrymandering. Both the object and the natural tendency of a gerrymander, as is well pointed out by Chief Justice MORSE in *Giddings v. Blacker* (Mich.), 52 N. W. Rep., 944, is to perpetuate the control of the government in the hands of a political party, even against the wishes, protests and votes of a majority of the people; and there are very few complaints made against it by the most upright men of that party. Objections to it come from the party so kept out of power. It has even been gravely urged as a reason for upholding a gerrymander, that the complaint against it was a political action, coming from the opposite party.

Even when in the course of time, the quondam cause of right triumphs, and the gerrymandering crew are ousted from their place of power, the mischief does not cease. No man ever saw a pendulum drawn back to the end of its beat, and then released, stop of its own accord in the middle of its oscillation. It swings straight to the other extreme. And, likewise, the first act of a party just coming into power is usually to rearrange the election districts so as to perpetuate its hold upon the government. This has apparently been the case in every State of the Union in which gerrymandering has been rife, and furnishes the strongest possible reason why the courts should exercise a power which the individual, or his aggregate, the people, has no desire to exert, until he gets the shoe on the other foot, and finds that it pinches.

It being settled, then, that the courts have the power to review such acts, the next question is, how

far are they reviewable? Naturally, whenever and to whatever degree they overstep the limits set by the Constitution. Here another effort has been made to nullify the power of the judiciary in this regard by claiming that the provisions of the Constitution in reference to apportionments are directory, and not mandatory. But the general current of authority is in favor of treating all constitutional provisions as mandatory: *Peo. v. Lawrence*, 36 Barb. (N. Y.), 177; *Cooley*, Const. Lim., 2d Ed., 181. The claim that the constitutional provisions in regard to apportionment are directory seems to be especially without foundation. Judge ORTON, in the first Wisconsin Gerrymander Case, *State ex rel. Attorney General v. Cunningham*, 81 Wis., 440; S. C., 51 N. W. Rep., 724, disposes of it very briefly. "That most dangerous doctrine, that these and other restrictions upon the power of the legislature are merely declaratory, and not mandatory, should not be encouraged, even to the extent of discussing the question. The convention, in making a constitution, had a higher duty to perform than to give the legislature advice;" and Judge PINNEY, with delicate satire, remarks in the same case: "It does not appear that the language used (in the debates of the convention) was employed by way of exhortation to the legislature to eschew the pernicious method of gerrymandering then recognized as an evil to be greatly deplored. It better suits the important character of the rights sought to be guarded, and the character and purpose of the instrument, to regard these provisions as mandatory, and not directory merely."

It has also been claimed that al-

though a transgression of a positive mandate of the Constitution is reviewable, yet the exercise of a discretionary power is not: *Peo. ex rel. Carter v. Rice*, *supra*; *Peo. ex rel. Baird v. Broome*, 20 N. Y. Suppl., 470. This rests upon a mistake, however. There is no such thing as an absolute, uncontrolled, unreviewable discretion vested in any man, or any body of men, under a constitutional government. All delegated powers must of necessity have limits; and if there be none expressed, there is always the implied qualification, that the powers granted be not abused. Even in affirming *Peo. v. Rice*, the Court of Appeals took care to say: "We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the Constitution that it could be seen that it had been entirely lost sight of, and an intentional disregard of its commands, both in the letter and in the spirit, had been indulged in:" 31 N. E. Rep., on p. 929.

When the mandate of the Constitution is direct and positive, there is no room for discretion, and any transgression of it will render the Act unconstitutional. When the Constitution provides that the apportionment and districts so made shall remain unaltered until another enumeration of the population, the boundaries of the districts cannot be changed, either directly or as an incident of the alteration of town or city lines: *Peo. v. Hollahan*, 29 Mich., 116; *Kinney v. Syracuse*, 30 Barb. (N. Y.), 349. A legislature cannot apportion a greater number of representatives than is allowed by the Constitution: *State*

v. Francis, 26 Kans., 724. And when the Constitution prohibits the division of a country or district, any apportionment which violates that prohibition is unconstitutional and void: *State ex rel., Attorney-General v. Cunningham, Secretary of State*, 81 Wis., 440; S. C., 51 N. W. Rep., 724. "Under negative and prohibitory constitutional provisions, the Legislature may often refrain from doing things which are not prohibited, but it can never do what is prohibited:" *State v. Francis*, *supra*.

When the Legislature is vested with discretion, its Acts are valid, so long as that discretion is not abused; and the courts will not investigate too closely, nor set the brand of unconstitutionality upon what may have been a mere error of judgment. "For the wisdom or unwisdom of what they have done within the limits of the powers conferred, they are answerable to the electors of the State, and no one else:" *State v. Campbell* (Ohio), 27 N. E. Rep., 884. It therefore becomes necessary to determine what those limits are, or, rather, to decide how far the Legislature may go without so far overstepping them as to warrant judicial interference. A degree of discretion is obviously conferred by those constitutional provisions which require that the apportionment shall be according to the number of inhabitants, or that the districts shall be, as nearly as may be, equal in population. There is some difference of opinion in respect to the latitude of this discretion; but it is acknowledged on all sides that it is impossible to attain mathematical exactness in this regard: *Prouty v. Stover*, 11 Kans., 235; *State ex rel. Attorney-General v. Cunningham*, 81 Wis.,

440; S. C., 51 N. W. Rep., 724; State *ex rel.* Lamb v. Cunningham (Wis.), 53 N. W. Rep., 35; Giddings v. Blacker (Mich.), 52 N. W. Rep., 944; Peo. *ex rel.* Carter v. Rice (N. Y.), (the principle case), 31 N. E. Rep., 921. And that all that is really requisite is the exercise of an honest and fair discretion. If there are any glaring inequalities of population or representation, it is a sure proof that such a discretion has not been exercised, but that the requirements of the Constitution have been willfully and intentionally disregarded and violated for partisan purposes; and it will warrant a decision that the apportionment is unconstitutional and void, without any direct proof of wrongful intent on the part of the Legislature: Peo. v. Canaday, 73 N. C., 198. "It is proper to say that perfect exactness in the apportionment, according to the number of inhabitants, is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, that evinces an intention on the part of the Legislature to utterly ignore and disregard the rule of the Constitution in order to promote some other object than a Constitutional Apportionment, then the conclusion is inevitable that the Legislature did not use any judgment or discretion whatever." ORTON, J., in State v. Cunningham, 81 Wis., 440; S. C., 51 N. W. Rep., 724.

In the case just cited the ratio of

representation was 51,117 for each senate district, and 16,868 for each assembly district; but the apportionment made one senate district 68,000, and another 38,000; one assembly district 38,000, and another 7,000. This, in the language of Judge ORTON, was "a direct and palpable violation of the Constitution." As soon as this decision was rendered, the legislature made haste to pass another Act, which avoided the dismembering of assembly districts, another of the blemishes of the former Act, but made the discrepancy in population in some of the districts even greater than before; *e. g.*, 30,732 in one, and 65,952 in another. This also was held to be a violation of the Constitution in State, *ex rel.* Lamb v. Cunningham, 53 N. W. Rep., 35.

A very similar state of affairs prevailed in Giddings v. Blacker (Mich.) 52 N. W. Rep., 944. There nine counties, with an aggregate population of 97,000, had been united into one district, and eight other counties, contiguous thereto, into another district, with a population of but 40,000, the ratio of representation being 65,000; eight districts, with but 349,056 population, had been given the same representation as 695,717 in eight others; and the Democrats, with a majority of less than 5,000 in a total vote of about 400,000, had control of twenty-one senatorial districts to the Republicans' eleven, thus making it clear that the apportionment was only a political device, to even up matters with the latter, who for their part had previously so apportioned the State, in 1885, as to control twenty-one senatorial districts to eleven, and had given eight counties with 316,578 population the same represen-

tation as eight others, whose aggregate was 532,222. It is no wonder that the Court declared that a "constitutional discretion was not exercised in the Apportionment Act of 1891. The facts themselves demonstrate this beyond any controversy, and no language can make the demonstration plainer."

The same conclusion was arrived at in *Peo. v. Canaday*, 73 N. C., 198, where the city of Wilmington had been divided into three wards, with equal representation; but the first and second wards each contained about 4,000 votes, the third about 2,800. These discrepancies are hardly more strongly marked than some of those in the principal case, as for example, that of 135,418 between the twelfth and thirteenth senatorial districts; and this fact, in view of the otherwise uniform current of authority, would tend to throw grave doubt upon the correctness of the decision there given, were it not for the claim in the opinion that the figures of population given here and in the prefixed statement, though found in the opinion of Judge RUMSEY at special term (19 N. Y. Suppl., 978), were not properly before the Court, and so could have no influence upon its decision. But this is not a valid excuse; for courts take judicial notice of the population of cities and towns according to the authorized census reports: *Hawkins v. Thomas* (Ind.) 29 N. E. Rep., 157; *Bank v. Cheney*, 94 Ill., 430; *Peo. v. Williams*, 64 Cal., 87; *S. C.*, 27 Pac. Rep., 939; *Peo. v. Wong Wang* (Cal.) 28 Pac. Rep., 270, and of the local divisions of a county or State: *Linck v. City of Litchfield* (Ill.) 31 N. E. Rep., 123; *State v. Powers*, 25 Conn., 48; *Goodwin v. Appleton*, 22 Me., 453;

Winnipiscogee Lake Co. v. Young, 40 N. H., 420. Such a claim is rendered especially peculiar in this case by the fact that the same opinion urges as a fact to be considered in upholding the validity of the apportionment of assemblymen, that three of the counties improperly preferred showed large gains of population, *according to the census*. If it could be referred to for one purpose, why not for the other?

It may be regarded, then, as settled beyond a doubt, that an apportionment act will be declared unconstitutional if there is any manifest abuse of the limited discretion reposed in the legislature by the Constitution; but there is some difference of opinion as to what constitutes such an abuse. In the cases cited from North Carolina, Michigan and Wisconsin, and in the principal case also, if we are permitted to look at the figures, which it is contended we have a perfect right to do, the abuse of discretion is so glaring as to leave no room for question, unless an exceedingly liberal and unwarrantable construction is put upon the words "as nearly as may be." Yet it was in this very manner that, after indulging in a curious and rather incomprehensible arithmetical juggle, the Court in the principal case disposed of the second objection to the validity of the act, that based upon the failure of the legislature to apportion the extra members of the Assembly in strict order to the counties having the largest surplus over the unit of representation. The constitutional requirement, that the apportionment of members of Assembly among the several counties should be, "as nearly as may be, according to the

number of their respective inhabitants," was boldly construed out of the way by the lower Court in *Peo. ex rel. Carter v. Rice*, 20 N. Y. Suppl., 293, with serene disregard of the canon of construction, that words shall be understood to have their ordinary signification, by holding, as nearly as can be ascertained from the argument, that these words do not mean as nearly as possible, or practicable, but as nearly as the legislature may think proper. The case cited in support of this view, of conformity of procedure in Federal courts to that in State courts, has no real analogy. A mere matter of procedure, and one of substantive right, are wholly different in their nature, and a degree of discretion may well be allowed in the former that would be ruinous in the latter. The Court of Appeals did not adopt this reasoning, but declared the words to be "a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall be made." But Judge ANDREWS, in his dissenting opinion, concurred in by Judge FINCH, clearly points out the fallacies and dangers of such a doctrine. "The argument urged upon us that the words 'as nearly as may be' give a discretion to the legislature, if it means anything as applied to the circumstances of this case, means that the legislature may disregard the plain meaning and mandate of the Constitution. . . . When the Court can see that the rule of the Constitution was not in fact applied, and the circumstances for its application were clear and unequivocal, then there is nothing left to the Court but to declare the apportionment

void. The suggestion that the circumstances under which legislatures act in such matters give opportunity for the play of passion and prejudice, and therefore this must be considered in determining the validity of an apportionment act, seems to me to have no place in this discussion. The very object of constitutional restrictions is to establish a rule of conduct which cannot be varied according to the passion or caprice of a majority, and to fix an immutable standard applicable under all circumstances. If a departure from the fundamental law by legislatures can in one case be justified by the frailties of human nature, and the constitutionality of an act, may be made to depend in one case upon such a consideration, the constitutionality of all legislation may be governed by the same rule. I have said the very object in imposing restraints in the Constitution is to protect great principles and interests against the operation of such eccentric and disturbing forces. The discretion of the legislature, if any, in apportioning members ends where certainty begins, and that point was reached when the counties having the largest remainders were ascertained."

The full effects of the decision of the majority of the Court is best seen in looking at the facts of the case as they appear in the prefixed statement. Here one county, with 181,230 population, has three members, while another county, with a population of nearly 15,000 less, has four; one with 75,078 has two, while another, with 5,000 more, has but one. It needs a deal of argument to prove this a just and legal exercise of discretion.

This very point arose in Board of Supervisors of Houghton Co. *v.* Blacker (Mich.) 52 N. W. Rep., 951, and was there thus tersely disposed of: "There can be no legal discretion, under the Constitution, to give a county of less population than another a greater representation. Such action would be arbitrary and capricious, and against the vital principle of equality in our government, and it is not intended or permitted by the Constitution; nor could such action lead to any good result. There can be found no excuse for it." It is to be feared, therefore, that while the majority opinion in the principal case asserts the validity of the new apportionment act of 1892, it fails to prove it.

The Court itself seems to have felt the inherent weakness of the arguments upon which it relies, for it introduces a number of extraneous considerations to prove the wisdom of its decision. Chief among these are the dire consequences which would flow from a decision against the constitutionality of the act, compelling a declaration that the preceding apportionment act was invalid, and thus throwing the elections back upon an act more than a quarter of a century old. But, as Judge ANDREWS says, "The attempt to justify the apportionment of 1892 by the fact asserted (which seems to be true) that the apportionment of 1879 was subject to as great or greater objection on the score of inequality than the later act, fails because the fact is irrelevant. It is one thing that a legislature has disregarded its duty on a former occasion, and that the people have acquiesced in the usurpation, and quite a different and a much more

serious thing if such a disregard of constitutional limitation should receive judicial sanction." Two wrongs never made a right. The Court has no business to concern itself with consequences, when the path of duty is clear. It is in no way responsible for them. The Supreme Court of Michigan in a similar dilemma boldly asserted both acts to be "tarred with the same stick," and set both aside; and Chief Justice MORSK emphatically declared, "The consequences of this decision are not for us. It is our duty to declare the law, to point out the invasion of the Constitution and to forbid it." *Giddings v. Blacker, supra*, p. 948.

This same argument *ab inconvenienti* was presented in a somewhat different form by Judge WINSLOW in a dissenting opinion in State, *ex rel.* Lamb *v.* Cunningham (Wis.) 53 N. W. Rep., p. 59, where he urges that a decision against the act would brand every legislature since 1852 as *de facto* merely, inasmuch as every prior apportionment act had contained greater discrepancies; but it is hard to see the exact force of this, since the acts of a *de facto* legislature are valid, on grounds of public policy: ORTON, J., in State *v.* Cunningham, 51 N. W. Rep., on p. 729. See also Auditor General *v.* Board of Supervisors (Mich.) 51 N. W. Rep., 490-491. He also lays much stress upon contemporaneous construction, shown by these same apportionments (which, however, would be all the stronger reason for putting a stop to the thing before it went any farther); but the strongest ground of objection that he adduces is the danger that the courts, by continued adverse decisions, may at last substitute their apportion-

ment for that of the legislature. At present, however, there seems to be but little cause for apprehension on this score, and it will be time enough to consider it when the evil becomes pressing.

The validity of an Apportionment Act may be called in question by either *quo warranto* (Peo. v. Canady, 73 N. C., 198), *mandamus* (Peo. v. Rice, 31 N. E. Rep., 921), or injunction (State *ex rel.* Att.-Gen. v. Cunningham (Wis.), 51 N. W. Rep., 724; S. C., 81 Wis., 440). The proper mode of procedure is, of course, at the relation of the attorney-general; but if that officer refuses to act, then either *mandamus* or injunction may be brought at the relation of a private citizen; for otherwise such a refusal would prevent the people from obtaining redress for such an infringement upon their rights and liberties: Giddings v. Blacker (Mich.), 52 N. W. Rep., 944; State *ex rel.* Lamb v. Cunningham (Wis.), 53 N. W. Rep., 35. In

any case, however, the suit must be brought against an officer who is entrusted with duties in relation to the matter that are purely ministerial. There can be no direct judicial remedy, as against an unconstitutional apportionment, even by and through the extraordinary jurisdiction of the Court, unless the controversy can be made in some form with and against some officer whose duties are ministerial, and who is therefore amenable to the coercive power of the Court to compel execution of its judgment or decree. If the respondent is not, as to the matter in hand, a mere ministerial officer, owing mere ministerial duties, if he is vested with political or discretionary power subject to no limitation, the jurisdiction of the Court cannot be maintained; for the Court will not render a judgment or decree that it has no possible right to enforce." PINNEY, J., in State v. Cunningham (Wis.), 51 N. W. Rep., p. 735.

R. D. S.

COMMONWEALTH v. TIERNEY. SUPREME COURT OF PENNSYLVANIA.¹

SYLLABUS.

Liquor License Law—Social Clubs—Device to Evade the License Law.

A wholesale liquor dealer whose license had been withheld, was indicted soon after for selling liquor in the same old bar-room without a license. His defence was that he was not selling on his own account but as steward of the Ellsworth Club, and that no sales were made to any but members of the club unless brought there by members. The club room was only a space of about six feet square, partitioned off from the old bar-room, although over one hundred members were claimed. The building was owned by the defendant, who lived there with his family. All liquors, it was alleged, belonged to the club, merely being dispensed by the defendant as steward. Each member had a key to the club room and paid an initiation fee of twenty-five cents and ten cents as weekly

¹ 24 Atl. Rep., 64; 1 Adv. (Leg. Int.), 584. See Editorial Notes (Infra).

dues. The main object of the club was sociability, and to some extent mental improvement. Its literary department consisted of two daily newspapers and the *Police Gazette*. The members paid the regular retail price for their drinks.

It was held that though it was a club in form, it was in fact a mere sham or device to evade the license laws; a mere bar-room where liquors were sold without a license. "There was a clumsy attempt to disguise its real character and throw over it the protecting mantle of the law. The latter is not so feeble, however, that it cannot pierce such a thin covering as this. . . . The rights of a *bona fide* club are not involved and we prefer to decide only what is legitimately and necessarily before us. . . . Were we to countenance such a sham as this, any man who is refused a license can get a few of his customers to sign a paper constituting themselves a club, rent them his old bar-room, have himself appointed a steward, and by such clumsy device evade the law. We cannot dignify such an association by treating it as a club."

Opinion by PAXSON, C. J.

SOCIAL CLUBS AND THE LIQUOR LAWS.

It is needless to state that clubs are becoming an increasingly important element in modern social life, and that they exist generally throughout the country. Their usual purpose is to provide for the social and intellectual entertainment of their members, and they are chiefly supported and maintained by the fees, dues and assessments required of their members. The transaction of business for profit is rarely, if ever, contemplated. Intoxicating liquors are in many cases bought by clubs and furnished to their members only, at a price fixed by club regulations. The money received in this way is used for maintaining the supply of liquors and paying the cost of their keep and service, and the other expenses of the club. The question of whether or not this method of furnishing intoxicating liquors by a club to its members constitutes a sale within the meaning of a law that requires a license before one can engage in the retailing of such liquor, or whether it constitutes a sale within the meaning of statutes prohibiting all sales of intoxicating

liquor whatever, has led to many and conflicting decisions. The principal case suggests a natural division of the subject, and for convenience of treatment the decisions will, therefore, be discussed under two heads: first, as they affect clubs formed with the view of evading the requirements or prohibition of liquor laws; and, second, as they affect *bona fide* clubs.

(a) *As to Clubs Formed to Evade the Liquor Laws.*—As to these all authorities agree that the courts will not tolerate any attempt whatever to evade the liquor laws by clubs formed for that purpose. The mere formation of a club, whether by way of association or incorporation, will not protect a vendor of liquors from the penalties imposed for selling without a license where the real and transparent character of the transaction, and so understood by the participants, is nothing but the device of an individual to sell liquor without a license and for personal profit. One inquiry must always be whether the organization is *bona fide*, a club with limited and selected membership, and in

which the property is actually owned in common with the rights of common ownership under the rules of the club, or whether the form of the club has been adopted for other purposes, with the understanding that the mutual rights and obligations of the members shall not be while the *substance* of what is done such as the organization purports to create. "By the evasion of the law mentioned, is intended an evasion by means of a form or device, which is apparently legal, is within the prohibition of the statute:" *Com. v. Pomphret*, 137 Mass., 567.

Such a scheme is presented by the case of *State v. Tindall*, 40 Mo. App., 271, where the make-up of a club-room was, in all respects, similar to an ordinary bar-room, and the dram-seeker, by signing articles of association and paying an admission of twenty-five cents, could obtain liquors at the ordinary retail rates from the defendant, who apparently had complete control. It was held to be "such a palpable scheme that the defence was devoid of any merit."

The case of *Richart v. People*, 79 Ill., 85, has been decided to be another example of an attempted evasion. Here, an association, styling itself the "Wheaton Co-Partnership Company No. One," apparently bought out the dram-shop of one of its members, who continued in possession as treasurer of the association. Any person could become a member by purchasing from the treasurer a "Certificate of Co-partnership Investment in the Wheaton Co-Partnership Company No. One," at a cost of one dollar. The certificate was stamped with numbers from one to twenty, and presentation thereof to the treasurer, entitled the holder to

liquors or cigars, which were really paid for at the ordinary prices by having the certificates punched at the rate of five cents a number. All purchases and sales were made by the treasurer, who never accounted for, nor was it ever intended that he should account for, the money.

Other specimens of so-called "clubs" that have been treated as mere attempts to evade the liquor laws, are found in the principle case of *Comm. v. Tierney*, 24 Atl. Rep., 64, and the cases of *State v. Mercer*, 32 Ia., 405, and *Comm. v. Ewig*, 145 Mass., 119.

The question of whether any given club is *bona fide*, or an attempted evasion is a matter of fact, and the court has no right to rule, as matter of law, that any such arrangement as the facts may show, was an evasion of the law. It is a question for the jury upon all the facts and under appropriate instruction: *Com. v. Smith*, 102 Mass., 144; *Com. v. Ewig*, 145 Mass., 119; *Rickart v. People*, 79 Ill., 85; *Mavemont v. State*, 48 Ind., 21.

(b) *As to Bona Fide Clubs*.—It has recently been said that it would be difficult to find another subject of equal importance and novelty concerning which so large a number of decided cases had left the law in so chaotic a condition. An examination of the cases justifies the assertion. It is impossible to reconcile them either by a comparison of the wording or object of statutes or the interpretation of words, and, therefore, they will be grouped according as they do or do not favor the freedom of the clubs.

1. *Cases upholding the right of bona fide clubs to distribute intoxicating liquor among its members for money without a license, notwithstanding the license laws.*

This conclusion has been reached by the various cases in two different ways: first, by a technical interpretation of the meaning of the word "sale" employed in license and prohibition acts, and holding it inapplicable to the method of distribution of refreshments used in clubs, and the second, by a liberal interpretation of the whole statute involved, deciding from its spirit and intent, as shown by its general provisions, that it was not intended to apply to the business of selling liquor to the public for profit.

(a) Freedom of clubs from the liquor laws through technical interpretation of the word "sale."

A sale is defined to be a transfer of the absolute or general property in a thing for a price in money (1 Benj. on Sales, 1). It is therefore argued that the furnishing by a club of liquors purchased with the money raised from fees and dues of members is not a sale within the meaning of the License Acts, but an equitable arrangement for the distribution of property among co-owners, which each member has a right to enforce by reason of the club's rules and regulations. In other words, some courts maintain that the requirement of the payment of money for liquor used by members is only a recognition of the fact that the tastes and needs of individuals in this respect differ so greatly that the only method of levying an equitable assessment to maintain the supply of refreshments is by requiring the members to pay a sum fixed by the amount of liquor actually used by the individual. This result is somewhat affected by the method of formation of a club, whether it is an association or a corporation.

The first case that arose where the club was an association, as well as the first case upon the subject in general, was *Com. v. Smith*, 102 Mass., 144 (1866). The defendant was indicted under a statute treating as a public nuisance the keeping of any place where liquor was sold without a license. A number of persons composing an unincorporated club advanced a certain sum of money each, thus creating a common fund. The defendant being appointed agent of the club, purchased liquors and other refreshments with the money thus raised, and then distributed checks at the rate of five cents each to the members in proportion to the amount advanced by each. Upon presentation of the checks the defendant would deliver to the holder liquor of corresponding amount. The jury having found that the transaction was *bona fide*, AMES, J., said: "It certainly has happened, and not infrequently, that a number of persons unite in importing wines or other liquors from a foreign country to be divided between them according to some fixed proportion. Certainly the person who should receive them and superintend the division among the contributors in proportion to the purchase money is not a seller of liquors. If the liquors really belonged to the members of the club and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them and to be divided among them according to a previously arranged plan, there would be neither a selling nor a keeping for sale."

The case which is usually quoted as the leading authority for this doctrine is *Graff v. Evans*, L. R. Q. B. D., 373. There the manager

of the Grosvenor Club, a *bona fide* association, was prosecuted for selling without a license, contrary to the English Licensing Act of 1872, which provides that "No person shall sell or expose for sale, by retail, any intoxicating liquor without being duly licensed to sell the same." Liquors and other refreshments were bought with the funds of the club and distributed by the defendant to the members for consumption, at fixed rates, the proceeds going to the general funds of the club. In deciding the case *FIELD, J.*, said: "The question here is, did Graff, the manager who supplied the liquors to Foster, effect a sale by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here nor any contract with Graff with respect to the goods. Foster was acting upon his right as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club and became entitled to have ale and whiskey supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property, which was not a sale within the meaning of

the section." See also *Com. v. Pomphret*, 137 Mass., 564.

Even where the clubs have been incorporated, the same theory that the regulations of the club amount substantially to a method of dividing the property among co-owners subject to an account, has been applied. *Seim v. State*, 53 Md., 566 (1880); *Newell v. Hemingway*, 16 Cox C. C., 604 (1888); *State v. McMaster*, 14 S. E. R., 270 (1891). The only reference to the difference of formation which it would seem should have at least some bearing upon the original ownership of supplies appears in *Seim v. State*, *supra*, where it says, "The society is not an ordinary incorporation, but a voluntary association or club intended for social purposes, and that as the members have a right to secure liquor under the regulations of the club, it is not a sale by way of trade which is taken to be the meaning of the word in the Act.

(b) Freedom of clubs from the provisions of license laws through a liberal interpretation of the whole statute.

Here it is maintained that the object of license laws is not to forbid the drinking of liquors, but to regulate the sale subject to penalties. The legislature has the power to prohibit as well as to license. Its control of the subject is complete, and therefore it is its duty to clearly describe the subjects to which the penalties may be applied. These subjects are to be ascertained from the statute taken as a whole, from its intent and spirit, as shown by its omissions, as well as its provisions, and from a due regard to the old law, the mischief and the present remedy. Thus in *Barden v. Montana Club*, 10 Montana, 330, the provision

of the license law that "*All persons* who sell directly or indirectly any spirituous, alcoholic, vinous or malt liquors shall, before the transaction of such business, obtain a license," etc., was very similar as to the subjects to which it was to apply to another portion of the license laws providing for the payment of a certain sum by "*any person or persons* who shall keep any house or saloon or room where any game of chance is dealt in or played for money." And since afterwards the legislature had amended the latter to read, "Any person or persons, or *association* of persons, who shall keep any house or saloon or room or *club-room* where any game of chance is dealt in or played for money," it was held, as there was no room for construing the Act relating to gambling games, that "where these distinctions are so carefully preserved, it is a reasonable inference that the legislature did not designate the business of the appellant in framing the law defining licenses." Likewise in *Tennessee Club v. Dwyer*, 11 Lea, 452 (1883) and *Piedmont Club v. Com.*, 87 Va., 340 (1891), the respective license laws of these two States were held upon a review of their various provisions to be intended only to require licenses from those persons who engaged in the business (as other merchants) of selling liquor to the public with a view to personal profit.

2. *Cases requiring clubs to be licensed*—On the other hand it has been settled in even a greater number of jurisdictions that the distribution by a club to members, of liquors for money, has every element of a sale, and that, therefore, they cannot sell without a license under license

laws, nor at all under prohibition laws.

The license laws, they say, indicate no purpose or intention of enabling every person, natural or artificial, to obtain a license, and, therefore, the incapacity to receive a license does not exonerate the seller from the penalty of selling without a license.

It is maintained with force that mere good faith cannot grant extra privileges, that there are certain crimes which do not depend upon the intention of the offender and are not to be distinguished from simple torts, except by the fact that in the one case an individual sues for damages resulting from the private tort, while in the other the State prosecutes for the penalty fixed for the public wrong. In these cases the offence consists in the act done, without regard to the intention with which it is committed. There is no difficulty in attributing to a corporation an offence of this character since it may be committed by the company's agent or servant employed for the purpose.

The whole basis of these divisions is that the distribution of liquor by a club to its members for money is a sale within the meaning of the acts, and, therefore, subject to their provisions. As before, the reasons vary somewhat with the nature of the formation, whether an association or corporation.

As to associations, the first case, *U. S. v. Wittig*, 2 Law, 466, arose under an attempt to subject a *bona fide* club to the U. S. revenue tax upon retail liquor dealers. "There seems to me," said Judge LOWELL, "to be no doubt that the club sells the liquor to its members. Every element of sale is present, the delivery of the beer on the one part,

and the payment on the other. It was argued that at common law a man cannot buy of himself and others. This is a mistake. The common law recognizes such a sale, though if the contract is executory, the common law has no mode of enforcing it."

In *State v. Neiss*, 108 N. C., 787, the steward of the Cosmopolitan Club, an institution of high social standing, was indicted for selling liquor in violation of a local option prohibition statute. The liquor was purchased with money taken from a common fund created by the members treating themselves as unorganized, and were distributed to members at cost. "When in the present case," said CLARK, J., "an individual received drinks for himself and friends, he clearly did not receive the identical liquor which belonged to himself, but he received liquor which belonged mostly to others, and in which he had a minute undivided interest. Before the transaction the money was solely his and the liquor belonged to several. By virtue of the transaction and in exchange for the money the liquor became his sole and separate property. This is surely a sale. It has every element of a sale. . . . The dealing here is simply what is known as 'co-operation,' which is an arrangement by which a member of an association procures for an association at cost. The object and the effect of co-operation is not to abolish purchases, for the members still buy from the association, but to procure supplies at cost. This transaction is necessarily either a partition in severalty to the tenant in common or a purchase. It is clearly not a partition to each tenant in common of his undivided portion in the common

stock, and it is plain that such is not the purpose and intent of the parties, for money is received in exchange, and it is to be used to obtain more liquor." Also *Negales v. State*, 10 So. R. Miss., 574; *People v. Andrews*, 115 N. Y., 427; *Marmont v. State*, 48 Ind., 21.

In incorporated clubs the same result is reached by treating the transaction as a sale by the corporation to an incorporator instead of by a copartnership to a member of the firm. The corporation is a legal entity and the owners of the liquors purchased with its money. As owner, through its servants, it delivers them to the purchaser at their call and charges a price fixed by the corporation. The property in the goods settles and vests in the purchaser and the money is received for and becomes the property of the club. A corporation can make contracts and deal with a corporator precisely as with a stranger, and the contracts thus formed are valid and capable of enforcement. The transaction is therefore a sale of liquors and the wrongdoer is liable to the penalties of the license and prohibition laws: *Newark v. Essex Club*, 53 N. J. L., 99; *People v. Soule*, 74 Mich., 250; *State v. Lockyear*, 95 N. C., 633; *Chesapeake Club v. State*, 65 Md., 446; *State v. Easton Club*, 73 Md., 97; *Martin v. State*, 59 Ala., 34; *State v. Horasek*, 41 Kan., 87; *People v. Bradley*, 11 N. Y. Sup., 94; *Kentucky Club v. Louisville*, 17 S. W. Rep., 745.

The results of the statutes and decisions in the States of Massachusetts and Maryland merit special attention.

It was settled as early as 1869 in the former State by *Com. v. Smith*, *supra*,—followed by *Com. v. Pomphret*, 137 Mass., 564, *Com. v. Ewig*, 145 Mass., 119, and *Com. v. Geary*

146 Mass., 189—that the clubs did not “sell” to their members and so were not liable under their license acts. In 1881 it was enacted that “In any town in which the inhabitants vote that license shall not be granted all buildings or places therein used by clubs for the purpose of selling, distributing or dispensing intoxicating liquors to their members and others shall be deemed common nuisances,” and in 1887 the statute was extended to cover clubs in places voting for licenses, unless they should first take out a special club license as required by the latter act. Under the “selling, distributing or dispensing” clause of the Act of 1881, it was decided that a place would be equally a nuisance if used by a club either to sell intoxicating liquors to its members or to distribute among its members intoxicating liquors

owned by them in common, or to procure for and dispense to its members intoxicating liquors which was bought for and belonged to them individually: *Com. v. Reber*, 152 Mass., 537; *Com. v. Jacobs*, 152 Mass., 276; and *Com. v. Ryan*, 152 Mass., 283. To escape this penalty it would have to appear that the club did not own any liquor; that it neither sold, nor distributed, nor dispensed any; that each member kept at the club—as he might in his dwelling—a private stock of liquor, purchased either by himself or by the steward of the club at his special direction and as his agent and not as the agent of the club, and that payment for the liquor was, in every instance, made with money of the member to the dealer and not to the club or any one for it: 4 Harvard L. R., 183-4.

MAYNE R. LONGSTRETH.

DEPARTMENT OF CRIMINAL LAW AND CRIMINAL PRACTICE.

EDITOR-IN-CHIEF,

PROF. GEORGE S. GRAHAM,

Assisted by

E. CLINTON RHODES,

C. PERCY WILCOX.

COMMONWEALTH *v.* RANDOLPH.¹ SUPREME COURT OF PENNSYLVANIA.

Test of Crime at Common Law—Solicitation to Commit Murder.

The test whether a certain act is a crime at common law is whether it injuriously affects the public police and economy. Therefore, a solicitation to commit murder, accompanied by the offer of a money reward, is indictable as an offence at common law.

¹Decided January 4, 1892. Reported in 146 Pa., 83.

STATEMENT OF FACTS.

The indictment charged substantially that the defendant did, with force and arms, etc., unlawfully, wickedly and maliciously solicit and invite one Samuel Kissinger, and by the offer and promise to pay to him the sum of \$1,000, did incite and encourage him, the said Samuel Kissinger, one William S. Foltz, in the peace of the Commonwealth, feloniously to kill, murder and slay.

The defendant was found guilty, and, thereupon, moved for a new trial, and in arrest of judgment and assigned the reason that the indictment charged no offence either at common law or by statute.

The Court below overruled both motions, and on appeal to the Supreme Court, this judgment was affirmed.

OFFENCES AT COMMON LAW.

Upon being asked whether a certain act is indictable or not the question arises, is the matter complained of forbidden by a positive law or statute, or is it contrary to the common law?

What is "an offence at common law?" Blackstone in his *Commentaries*, Book IV, page 162 says, "The last species of offences which especially affect the Commonwealth are those against the public police or economy. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society and are not comprehended under any of the four preceding series."

It is indictable under the common law in Pennsylvania as a common nuisance, to draw together in the streets of a city large numbers of people by means of violent, loud and indecent language, whereby the public right of passage along the street is prevented and obstructed. *Barker v. Com.*, 19 Pa., 412 (1852).

In a case decided in Massachusetts where the defendant was indicted for illegal voting for selectmen, the Court said: "There cannot be a doubt that the offence described in the indictment is a misdemeanor at common law. It is a general principle that where a statute gives a privilege and one wilfully violates such privilege, the common law will punish such violation." *Com. v. Silsbee*, 9 Mass., 417 (1812), and in *Com. v. Hoxey*, 16 Mass., 385 (1820), an indictment at common law for disturbing a town meeting was sustained. Likewise in Pennsylvania, to disturb a meeting of a board of school directors was held to be a common law offence. *Cam-*

bell *v. Com.*, 59 Pa., 266 (1868). Among the different offences which may be indicted and punished at common law are the following: Common brawlers, *Com. v. Foley*, 99 Mass., 497 (1868); common scolds, *James v. Com.*, 12 S. & R. (Pa.), 220 (1825); *Com. v. Mohn*, 52 Pa., 243 (1866); anything shocking the religious sense of the community, *State v. Pepper*, 68 N. C., 259 (1873); *Updegraph v. Com.*, 11 S. & R. (Pa.), 394 (1824); any acts prejudicial to public health, *Meeker v. Van Renselear*, 15 Wend., 397 (1836); *State v. Buckman*, 8 N. H., 203 (1836); exposing a person or animal suffering from disease, *Rex v. Vantandillo*, 4 M. & S., 73 (1815); eavesdropping, *Com. v. Lovett*, 4 Clark (Pa.), 5 (1831); *State v. Williams*, 2 Tenn., 108 (1808); open and notorious lewdness, *Regivo v. Harris*, 11 Cox C. C., 659 (1871); *Peak v. State*, 10 Humph. (Tenn.), 99 (1849); *State v. Moore*, 1 Swan (Tenn.), 136 (1851); keeping a disorderly house to the common nuisance and disturbance of the community, *Hunter v. Com.*, 2 S. & R. (Pa.), 298 (1816); *State v. Evans*, 3 Iredell (N. C.), 603 (1845). In many States where a code has been adopted the application of the common law is thereby revoked and there can be no common law offences.

In Pennsylvania, however, to avoid this result, under the Code of March 31, 1860, P. L., 425 § 178, it is provided that "every felony, misdemeanor or offence whatever, not specially provided for in this act, may and shall be punished as heretofore." By reason of this provision an indictment will still lie against a woman as a common scold in Pennsylvania, *Com. v. Mohn*, *supra*.

So long as one can find a precedent there is little or no difficulty in determining whether or not a given state of facts can be punished at common law in the absence of a positive law or statute. But where no precedent exists in the books the question becomes more difficult. Particularly is this true when the circumstances and conditions constituting the offence complained of are in nowise analogous to any circumstances or conditions known at common law. For example, a school board was unknown in the machinery of government at common law; so, also, election officers and a ballot such as we now have were no part of the system of control in England in the days of the common law; hence it became an interesting question to decide whether the disturbance of a meeting of such school directors, or to commit a fraud by such election officers, or to cheat at an election can, in the absence of a statute or precedent, be punished as crimes under the old common law.

Two of these questions had been decided in Pennsylvania. The one relating to the disturbance of a meeting of School Directors in *Campbell v. Com.*, *supra*, and the other relating to the purity and fairness of elections in *Com. v. McHale*, 97 Pa., 397 (1881).

The want of precedents in the judicial history of England must not limit our courts in dealing with such offences. The want of precedents in England arises largely from the growth of cities and towns, the development of commerce and trade, changes in the relations of men and things, and the evolution of government which have created new conditions of crime. In some cases it is due to the enactment of

special laws with very severe penalties, which were rendered necessary when the changed circumstances of society brought opportunities for the commission of crimes theretofore unknown and impossible. In such cases, although these crimes contravened certain broad principles of the common law, indictments were of course brought under the statutes notwithstanding the power under the common law to punish them. These statutes were merely declaratory of the common law. Wherever these statutes may not be in force and the common law is recognized, of course indictments could be brought notwithstanding the absence of common law precedents: *State v. Briggs*, 1 Aikens (Vt.) 226 (1826); *Loomis v. Edgerton*, 19 Wend. (N. Y.) 419 (1838) and *Com. v. Chapman*, 13 Met. (Mass.) 68 (1847). There are certain broad principles of the common law which are recognized as the basis of indictability in the absence of precedents. All offences destructive or obstructive against government or public justice, or against public morals or the public peace can be indicted as common law offences in the absence of statute law or precedents. In fact whatever is provocative of a public disturbance, or consists of a malicious injury to the property of another, in such a way as to provoke a violent retaliation, or constitutes a public scandal or indecency, or is a breach of official duty, can be indicted as an offence at common law: *Walsh v. State*, 65 Ill., 58 (1872).

The test is not whether precedents can be found in the books, but whether the acts complained of injuriously affect the public police and economy: *Com. v. McHale*, *supra*.

Having considered the subject of what are common law offences, we will next take up the other matter which is decided in the case of *Com. v. Randolph*, viz., solicitations to commit crime. A mere intent to commit crime, as long as it is kept within the breast of the offender, is beyond the reach of the law, for it cannot undertake to regulate the thoughts and intents of the heart. The best it can do is to punish open acts. For the rest it trusts the people to the refining influences of Christian education: *Smith v. Com.*, 54 Pa., 209 (1867).

The intention to corrupt an officer is not punishable, but when that intention is evidenced by an overt act, such as a solicitation, the defendant has done his part towards consummating the guilt and may be punished therefor: *Barefield v. State*, 14 Ala., 606 (1848).

In *Schofield's Case*, Cald., 397, Lord MANSFIELD said: "So long as an act rests on bare intention, it is not punishable, but immediately when an act is done the law judges not only of the act done, but the intent with which it is done, and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."

The overt act which the law will recognize and take hold of is an attempt or a solicitation, which in a certain sense is a species of attempt.

In 1 Bishop on Criminal Law, 7th ed., § 767, it is said that "A common form of attempt is the solicitation of another to commit a crime; the act which is a necessary ingredient in every offence, consisting in the solicitation;" and in § 768 that all sufficiently direct

solicitations to commit any of the heavier offences are punishable attempts. It is within established principles to hold that, in proportion to the gravity of the particular crime, the solicitation, in order to come within the law's group, may be less direct

In *State v. Avery*, 7 Conn., 266 (1828) the Court said that a solicitation is an act and should be considered as an offence.

The Supreme Court of New York in *People v. Bush*, 4 Hill, 133 (1843) said that if the arson had been committed, which the defendant solicited another to perform, the solicitation would have been merged in an actual felony. There would be a principal arson by one and an accessorial offence by this defendant. The attempt of the latter was to have both crimes committed; and the question of principal and accessory being eliminated from the case, I see nothing against considering the matter in the ordinary way, that what a man does by another, he does by himself; in other words the solicitation by the defendant was the same thing as if he had taken steps preparatory to setting the building on fire himself. An attempt may be immediate; but it is very often a remote effort or indirect measure taken with intent to affect an object.

An approved writer on criminal law speaks of solicitation as belonging to a class of attempts.

As regards the requisites of an indictment for solicitation, Bishop, in his work on Criminal Law, 7th Ed., Vol. I., § 768, says: "The law as adjudged holds and has held from the beginning, in all this class of cases, an indictment sufficient which simply charges that the de-

fendant at the time and place mentioned, 'falsely, wickedly, and unlawfully did solicit and incite 'a person name to commit the substantive offence, without any further specification of overt acts. It is in vain, then, to say that mere solicitation, the mere entire thing which need be averred against a defendant as the ground for his conviction, is no offence."

We have now considered the question of intent and seen at what stage the law will take notice of the intention when it has progressed beyond the breast of the offender, and is declared by some overt act, and we have seen that a solicitation is, in substance, if not in reality, a species of attempt.

The general rule on the subject of the indictability of attempts is the one laid down by Baron PARKER in *Rex v. Roderick*, 7 C. & P., 795 (1837), and adopted by Russell on Crimes, p. 84, which is as follows: "An attempt to commit a misdemeanor is a misdemeanor whether the offence is created by statute, or was an offence at common law." From this rule we would draw the inference that solicitations in general to commit a crime are indictable, and on examining the cases, we will see that the weight of authority supports that proposition.

In the principal case which we are considering there is a dictum which would seem to narrow the scope of indictments for solicitations to commit crimes and *limit them to solicitations to commit felonies*. The decided cases seem to be against this dictum.

Chief Justice HOLT said in *Regina v. Turvey*, Holt, 365 (1703), "To persuade and solicit is a crime."

In *Rex v. Plympton*, 2 Ld. Ray-

mond, 1377 (1725), the Court said that it is indictable to promise money to a member of a municipal corporation for his vote at an election of said corporation, although nothing is done in pursuance thereof. This would be but a solicitation to commit a misdemeanor.

In *Rex v. Lawley, Fitzgibbon*, 263 (1730), it was held that an indictment charging defendant with endeavoring to dissuade a witness, the defendant knowing that J. C. had been indicted for forgery, was good.

In *Rex v. Vaughan*, 4 Burrows, 2494 (1769), the defendant was indicted for soliciting a privy counsellor to obtain an office for him.

In *Rex v. Higgins*, 2 East, 5 (1801), there was an indictment for soliciting another to steal and embezzle from his employer. Held to be good, although nothing was done in pursuance thereof, as such offences have a tendency to a breach of the peace. In this case the judge turned the decision on the broad principle that it tended to a breach of the peace, and also intimated further that a solicitation to commit a misdemeanor was indictable by saying, "all these cases prove that inciting another to commit a misdemeanor is itself a misdemeanor, *a fortiori*, therefore it must be such to incite another to commit felony."

The case of *State v. Caldwell*, 2 Tyler (Vt.) 212 (1802), was an indictment for advising and counselling another to resist a sheriff who was in the act of making a levy. Held to support an indictment for impeding and hindering a civil officer in the execution of his duty.

U. S. v. Lyles, 4 Cranch C. C., 469 (1834), decided that a solicitation to commit an assault and battery on another amounted to a misdemeanor at common law.

In *State v. Keyes*, 8 Vt. 57 (1836), the Court said that soliciting a witness to stay away from a public prosecution is indictable as a misdemeanor at common law, although such witness had not been regularly served with a subpoena, but who was known to the defendant to be a material witness. And in addition they said that they had no hesitation in holding that the solicitation of another to commit an offence should, with few exceptions, be indicted as a misdemeanor at common law.

People v. Bush, 4 Hill (N. Y.), 133 (1843), was an indictment for soliciting another to commit arson. Bishop, in his work on Criminal Law, 7th Ed., Vol. II, § 20 (note), says that, although this was under a statute, yet the statute was merely declaratory of the common law.

In *Barefield v. State*, 14 Ala., 606 (1843), it was said that the law abhors the least tendency to corruption, and at common law all attempts to bribe, though unsuccessful, were indictable.

In *State v. Carpenter*, 20 Vt. 9 (1847), which was an indictment for soliciting a witness not to attend a trial, the Court said that the attempt, whether successful or not, to obstruct the administration of justice, is a substantive offence punishable by common law. *Com. v. Reynolds*, 14 Gray (Mass.), 87 (1859), is to the same effect.

In the New York case of *McDermott v. People*, 5 Park C. C., 102 (1860), the prisoner collected certain materials in his room and then solicited another to make use of

them in burning A's barn. *Held*, affirming *People v. Bush*, *supra*, that this proof warranted a conviction for an attempt.

Regina v. Quail, 1 F. & F., 1076 (1866), was an indictment for inciting a servant to steal some silk from his employer. *Held*, to be good even if servant purposely submitted to the solicitation with intent to betray the defendant. *Regina v. Gregory*, 10 Cox C. C., 459 (1867), is to the same effect, and decides that the mere act of soliciting is indictable as a misdemeanor.

In *State v. Ellis*, 33 N. J. L., 102 (1868), there was an indictment for offering a bribe to a member of Councils. *Held*, that the common law offence of bribery is indictable, and that the offence is complete when the offer is made, although in a matter over which the public officer has no jurisdiction.

In *Walsh v. People*, 65 Ill., 58 (1872), the defendant was indicted for a proposal, made by himself, to receive a bribe to influence his action as alderman. The Court said: "We are of the opinion that it is a misdemeanor to propose to receive a bribe. It must be regarded as an inciting to offer one and a solicitation to commit an offence. This at common law is a misdemeanor. Inciting another to the commission of an indictable offence, though without success, is a misdemeanor."

Regina v. Ransford, 13 Cox C. C., 9 (1874), was an indictment for writing and sending a letter to a boy with the intent to incite him to commit an unnatural offence. KELLY, C. B., said: "I am clearly of opinion, in point of law, that any attempt to commit a misdemeanor is in itself a misdemeanor, and I am also of opinion that to incite or

even solicit another person to commit a felony or to do any act with intent to induce another to commit such offence, is a misdemeanor."

In *State v. Ames*, 64 Maine, 386 (1875), the Court said: "That it is a crime known to the common law to induce a witness to absent himself from a court where he is legally bound to appear to give testimony upon a criminal process there pending, is too clear for argument and too well settled to require the citation of authorities." The use of persuasive means, thus to obstruct the course of justice, is an overt act toward the consummation of a criminal purpose, and is indictable, whether or not the offender succeed in his attempt.

Com. v. Flogg, 135 Mass., 545 (1883), was an indictment for soliciting another to set fire to a barn and offering money for so doing. *Held*, that it is an indictable offence at common law for one to counsel and solicit another to commit a felony or other aggravated offence, although the solicitation is of no effect and the crime is not committed.

With regard to the principle laid down in *Com. v. Randolph*, that a solicitation to commit murder is a misdemeanor at common law, while abundantly sustained by principle and authority, yet there seems to have been but very few cases of this kind either in the United States or in England.

In addition to the principal case and the one referred to therein, there is the case of *Rex v. Guy*, mentioned in 2 East, 22. I am informed by the District Attorney of Philadelphia County that there is such an indictment now pending in this city, and that it is the only case which has ever arisen there.

This want of authorities should be considered, I think, to result more from the heinousness of the crime than from any doubt as to its indictability.

The doctrine which we have just considered and which is maintained by Mr. Bishop and a large number of cases both in this country and in England is limited somewhat by Mr. Wharton, in the 9th Ed. of his work on "Criminal Law," § 179, where he says: "Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice, as where a resistance to the execution of a judicial writ is counseled or perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. . . . They are indictable, also, when they are in themselves offences against public decency, as is the case with solicitations to commit so doing;" but subsequently adds this limitation: "And the better opinion is that, where the solicitation is not in itself a substantive offence, or where there has been no progress made towards the consummation of the independent offence attempted, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative."

The judge who delivered the opinion of the lower Court in *Com. v. Randolph* said, in answer to this: "I confess I do not understand him when he speaks of solicitations which 'themselves involve a breach of the public peace.' He must

mean 'a solicitation which tends to a breach of the peace.' A mere solicitation cannot involve a breach of the peace. A solicitation to commit murder is a solicitation to do an act which if done would be a breach of the public peace. . . . He begs the whole question, however, when he says that a solicitation is indictable only when it is a substantive offence. If it is indictable, then it is a substantive offence. If it is a substantive offence, then it is indictable. We can learn nothing from this argument based on the idea of substantive offences."

Regina v. Daniel, 6 Mod., 100 (1703), which was an indictment for soliciting an apprentice to leave his master, and *Regina v. Callingham*, 2 Ld. Raymond, 1116 (1704), which are often cited in opposition to the indictability of solicitations, did not decide that question because the case went off on other grounds. In fact, in the first case Lord Holt says that perhaps an indictment would lie for the evil act of persuading another to steal.

The case of *Com. v. Smith*, 54 Pa., 209 (1867), apparently decides that a solicitation to commit a misdemeanor is not indictable. The judge cites, in his opinion, the case of *Rex v. Butler*, 6 C. & P., 368 (1834), which was an indictment for soliciting a woman to lie down on a bed and then getting upon her. This case was, in substance, says Bishop in his work on Criminal Law, 7th Ed., Vol. I, § 768, a solicitation of the woman to allow defendant to commit an assault upon her. Such a count would be bad, for if she consented, there would be no assault. It could not be indicted as a solicitation to commit adultery, because that is no crime in England. The case of *Com. v.*

Smith is, therefore, only authority for saying that a solicitation to commit adultery is not punishable in Pennsylvania, and ought not to be considered an authority for the proposition that a solicitation to commit a misdemeanor is not indictable.

In *Brockway v. People*, 2 Hill (N. Y.), 561 (1842), the Court held that the renting of a house for the purposes of prostitution, was not an indictable offence. It said that every act done in furtherance of a misdemeanor, is not the subject of indictment; but to constitute it such, it must tend directly and immediately, if not necessarily, to the commission of the misdemeanor.

McDade v. People, 29 Mich., 50 (1874), decided that a statute, punishing the setting fire to a building with the intent that it should be burned, or the attempt by any other means to cause the building to be burned, will not warrant a prosecution for an attempt based on solicitation alone.

The case of *Cox v. People*, 82 Ill., 191 (1876), seems to follow the opinion of Mr. Wharton, in saying that a solicitation to commit crime is not in itself an offence, unless the offence is of such a character that its solicitation *tends* to a breach of the peace or the corruption of the body politic. But Mr. Wharton went further, and said that the solicitation must involve a breach of the peace. It was held in this case that a solicitation to commit incest is not indictable.

Mr. Wharton approves of this case; but says that a solicitation to commit sodomy is indictable, because it is in itself an offence against public decency. It may well be asked, as was said in *Com. v. Randolph*: "At what point in

libidinous crimes does he draw the line of 'public decency?'"

State v. Baller, 26 W. Va., 90 (1885), gives a very exhaustive treatise on the whole subject.

The case of *Lamb v. State*, 67 Md., 524 (1887), is only authority for holding that a mere solicitation to commit a misdemeanor is not in itself a misdemeanor, and that in the face of a strong dissent.

Hicks v. Com., 86 Va., 223 (1889), was a case in which the evidence showed a procurement of some poison, and an ineffectual solicitation of a third party to put it in the drink of the intended victim. Held, that "such acts are not an attempt, but only a preparation." To my mind some of his arguments to show the difference between an attempt and a preparation, are very finely drawn, and hardly convincing. In the opinion in that case the judge refers to *Stabler v. Com.*, 95 Pa., 318 (1880), as an authority, but it decided that the mere delivery of poison to a person, and soliciting him to place it in the spring of another, is not "an attempt to administer poison" within the meaning of the Act of March 31, 1860, P. L. 403, § 82. However, in another count of the same indictment, the defendant was charged with soliciting A. B. to administer a certain poison to C. D. and other persons unknown, and this count was sustained, *MERCUR, J.*, saying: "The conduct of the plaintiff in error, as testified to by the witness, undoubtedly shows an offence for which an indictment will lie without any further act having been committed."

The Court said in *Com. v. Randolph*, "We have, however, learned from the examination of the authorities already made, that there

are crimes which it is a misdemeanor at common law to solicit a person to commit. All the authorities noticed, including Mr. Wharton, agree on that. The only difficulty is to determine just what crimes, or what class of crimes, it is criminal to solicit or incite another to commit."

In *Com. v. Willard*, 22 Pick., (Mass.), 478 (1839), Chief Justice SHAW said, "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice or induce another to commit crime and when it does not. In general it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offence proposed to be committed by the counsel, advice or enticement of another is of a high and aggravated character tending to breaches of the peace or other great disorder and violence, being usually what are considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law."

Judge PAXSON, in *Com. v. Jones*, 31 Legal Int. (Pa.), 332 (1874), said, that there may be, perhaps, a distinction between misdemeanors which are *mala in se* and such as are *mala prohibita*, as in the case of acts which are not *per se* penal, but made the subject of a statutory

fine, as a matter of municipal regulation.

As a result of my examination of the cases bearing on the subject of solicitations I should say that a solicitation to commit a crime, whether it be a felony or a misdemeanor, is indictable unless it be some offence which because of its "little magnitude cannot have the appendage of attempt," examples of which would be solicitations to make illegal sales of liquor: *Com. v. Willard*, *supra*, and were police offences, etc.

The wisdom and indeed the necessity of punishing one who solicits the commission of crime was, perhaps, never better demonstrated than by President LINCOLN during 1863 in defending his action in having sent Vallandigham across the rebel line for having made a speech soliciting disloyalty. Mr. LINCOLN said, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of the wily agitator who induces him to desert? This is none the less injurious when effected by getting father or brother or friend into a public meeting, and there working upon his feelings until he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked administration of a contemptible government, too weak to arrest and punish him if he shall desert. I think that in such a case to silence the agitator and save the boy is not only constitutional, but is withal a great mercy."

C. PERCY WILCOX.

DEPARTMENT OF EXECUTORS, ADMINISTRATORS—WILLS.

EDITOR-IN-CHIEF,

HON. WILLIAM N. ASHMAN.

Assisted by

HOWARD WURTS PAGE.

MAURICE G. BELKNAP.

SOLINSKY *v.* FOURTH NATIONAL BANK OF GRAND RAPIDS.
SUPREME COURT OF TEXAS.¹

The assignee of a foreign administrator may maintain suit in a Texas Court for the collection of a promissory note, payable to the intestate, and to enforce a deed of trust made to secure its payment, in the absence of any Texas administration and Texas creditors, where the law of the foreign state has not been proved to deny the right of the administrator to make the transfer.

Opinion by HENRY J.

RIGHT OF ADMINISTRATOR TO MAKE TRANSFERS.

Under the system in England by which the goods of a decedent were administered in virtue of letters of probate or of administration granted by the ordinary, or by way of special prerogative from the metropolitan of the province, as the existence of *bona notabilia* in one or more jurisdictions made necessary (2 Bl. Com., 508, 509), little difficulty arose concerning the locality of personal property, such as household goods and movable chattels. But where the property consisted of choses in action, numerous disputes between the ordinaries made it necessary to establish for them some distinct *situs*: Att.-Gen. *v.* Bouwens, 4 M. & W., 171, 191. Specialty debts were accordingly held to belong to the jurisdiction where the specialties were found: Att.-Gen. *v.* Bouwens, 4 M. & W., 171, 191, Com. Dig. Administrator (B. 4), and simple contract debts where the debtor resided: Com.

Dig. Adm. (B. 4), Yeomans *v.* Bradshaw, Carth., 373; 3 Salk., 70; Pipon *v.* Pipon, Amb., 26.

Considering the question, however, as between State and State, instead of between different ordinaries jurisdictions, since no country can give its laws any extra-territorial force, it is easy to perceive the logic of reasoning that, debtors can only be compelled to liquidate their debts in the country where the debtor may be found and the authority of the personal representative is also recognized: Story's Conf. of Laws, § 512.

On the same principle and in the same light specialty debts are not recognized by the law of England as always assets wherever found, but the *situs* of such debts at any particular time likewise depends on the ability of the administrator at such time to sue the debtor within his jurisdiction: Wharton's Conf. of Laws, § 615;

¹ Reported in 17 S. W. Rep., 1050. Decided November 13, 1891.

Huthwaite v. Phaire, 1 M. & G., 159. The early case of Daniel v. Luker (1571) Dyer, 305, is not inconsistent with such a view. The defendant, a native of Ireland, in a suit in England by an English administrator, on a bond which had never been out of England, pleaded a release by the Irish administrator. While the decision presumptively went on the ground that, the bond was an asset where it was found, yet the case can also be brought within the principle that the *situs* of the debt is that of the debtor. In Whyte v. Rose (1842), 3 Q. B., 493, an action was brought in England by the English administrator of an intestate dying in Ireland on a deed which was in Ireland at the time of his death, and it was contended that an Irish administrator alone could sue, but the Court of Queen's Bench, speaking through TINDALL, C. J., held the English grant of administration to be sufficient. Mr. FOOTE (Foote's Int. Jus., 2d ed., 279), having stated the facts of these two cases, says: "It is difficult to regard the *situs* of such a bond as the real locality of the assets represented by it, in preference to the country where the debt must be sued." "A contract in one place makes a man a debtor in every place." Peacock v. Bell, 1 Wm. Saund. 73.

While as between the ordinaries in England specialty debts were given the chattel-like quality of being assets wherever found, the rule did not extend to the case of bills of exchange and promissory notes. In Yeomans v. Bradshaw (1728), Carth., 373; 3 Salk., 70, the point was directly in issue. The administratrix of a deceased payee of a bill of exchange brought an action in London

against the drawer, by virtue of letters granted under the authority of the Bishop of Durham. Upon demurrer it was argued that, as trover would lie for the conversion of such a bill it must therefore be "goods and chattels" and should be considered *bona notabilia* wherever found, but Lord HOLT said, it was no more than a simple contract, *which followed the debtor*, and likened it unto an award in writing. (Cited with approval by Baron PARKE in Mondel v. Steele, 1 Dowl. Rep. (N. S.) 155; also in Wyman v. Halstead, 109 U. S., 656; Reynolds v. McMullen, 55 Mich., 568. See also Ingraham's Went. Exrs., 96; Atty.-Gen. v. Bouwens (1838) 4 M. & W., 171, 191; Rand v. Hubbard, 4 Met., 252).

On an information for probate duty, it appeared that, a resident of India having directed certain securities to be realized and the proceeds transmitted to his bankers in England, died while the proceeds of the sale, consisting of bills of exchange payable in six months after sight, drawn by a bank in India on a bank in London in favor of his bankers, were on their way to England. The bills having been duly honored and the money received by the defendant, the question was, whether the amount of the bills was subject to the duty. KELLY, C. B., in delivering his opinion, after stating that, he considered bills of exchange of the nature of personal chattels; because trover could be maintained for them, said, "secondly, on the ground which has been chiefly adverted to by my learned brothers, I am clear that the bills, or rather the money, property, or debt represented by them are liable for probate duty, namely, on the ground that where assets consist of debts,

they are assets where the debtor resides. There may, at first sight, seem to be some difficulty in applying this principle to the case, because at the time of probate no debt was due from any one. The drawer would only be under a liability in the event of the bill being dishonored, the drawee was under no liability; because he had not yet accepted the bill; there was therefore no actual debtor in existence. We are, therefore, driven to see who in fact became the debtor and provided and paid the money. Now the bills were presented for acceptance in due time; they were accepted and paid at maturity, the only persons, therefore, whoever became debtors were the acceptors. They were residents of London, and the money came to hand in London; the assets were therefore in London." AMPLATT, B., remarked: "Here the assets are represented by bills of exchange, which were then on their passage from India to England, but when the nature of a bill of exchange is considered, it will appear that they represent, but do not constitute the assets. The testator had ordered his agent to pay money to a bank in London. If this order had not been complied with, the testator would have had recourse to the drawer. But if it was complied with, and if either money or credit, which is represented by the bills of exchange was in London, then the assets were in London. If it had been otherwise, then the assets would have been in India." Att.-Gen. v. Pratt (1872), L. R., 9 Ex., 140.

In the earlier case of Att.-Gen. v. Bouwens (1838), 4 M. & W., 171, 192, a bill of exchange payable out of England was considered an instrument of chattel nature capable

of being transferred in England by the English administrator. The authority on which Lord ABINGER supports his opinion (PARKER, doubtless concurred), appears to be § 517 of Story's "Conflict of Laws." (See Westlake's Priv. Int. Law, § 88.) Adopting also § 516 to more clearly express the idea, it is there written: "If a foreign administrator has, in virtue of his administration, reduced the personal property of the deceased, there situated, into his own possession, so that he has acquired the legal title thereto according to the laws of that country, if that property should afterwards be found in another country, or be carried away or converted there against his will, he may maintain suit for it there in his own name and right personally, without taking out new letters of administration; for he is, to all intents and purposes, the legal owner thereof, although he is so in the character of trustee for other persons. The plain reason of such case is, that the executor has, in his own right, become full and perfect owner of the property by the local law; and a title to personal property duly acquired by the *lex loci rei sitæ*, will be deemed valid and will be respected as a lawful and perfect title in every other country. The like principle will apply where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration and may sue thereon in his own name; and he need not take out letters of administration in the State where the debtor resides, in order to maintain suit against him.

And for a like reason it would seem that negotiable paper of the deceased payable to order, actually held and endorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such endorsement, would confer a complete legal title on the endorsee, so that he ought to be treated in every other country as the legal endorsee, and allowed to sue thereon accordingly in the same manner that he would be if it were a transfer of any personal goods or merchandise of the deceased, situated in such foreign country."

"The maxim of the law of the civilized world is, "*mobilia sequuntur personam*," and is founded on the nature of things. When *mobilia* are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go along with the person." (Lord SELBOURNE in *Freke v. Lord Carbery*, L. R., 16 Eq., 466; Foote's Int. Jus., 2d ed., 224; Story's Conf. of Laws, § 380.) But, in the words of Judge BUTLER (*Carmichael v. Ray*, 1 Rich. 116), "it is a mistake to suppose that, upon his death, his legal representatives, appointed under the laws of his domicile, are invested with like title and power as to all such property; while the owner when alive is, clothed with this authority, yet his death is an event which changes the character of the title, and invests new parties with power over his estate:" *Dial v. Gary*, 14 S. C., 573.

No nation is under any obligation to enforce foreign laws to the prejudice of the rights of its subjects. It has been well said "the duty of every government is to protect its own citizens, and especially

the rights of creditors as the material and commercial prosperity of a country depends greatly on this protection and security. If a government fails in this, it fails in one of its most important functions and duties. To this end, therefore, it is well understood that the different governments in which the movable property of a deceased may be left, upon his death, are authorized to intervene and take control. Hence, in every State, we find laws declaring in whom such property, within its limits, shall vest, and in what manner it shall be administered:" SIMPSON, C. J., in *Dial v. Gary*, 14 S. C., 573. The title of an executor or administrator, derived from a grant of administration, cannot *de jure*, as a matter of right, extend beyond the territory of the government which grants it. The title acknowledged in another is acknowledged from comity. Reason is against extending the comity. "It would be a great hardship upon the creditors of a decedent in any country to allow a foreign administrator to withdraw the assets of his estate without the payment of their claims, and leave there to seek their remedy in a foreign jurisdiction, and, perhaps, then to meet, with obstructions and inequalities in the enforcement of their rights from the peculiarities of the local law:" Story's Conf. of Laws, § 512. This policy grows more important with the possibility of the decedent being insolvent, because the *lex fori* determines the priority of claims: Story's Conf. of Laws, §§ 524 and 525; Wharton's Conf. of Laws, § 622. Agreeably to these considerations it has been the general rule that, neither an executor or administrator may

maintain a suit in a foreign country, unless he has obtained a new grant of administration, or has qualified as required by the local laws: Story's Conf. of Laws, § 512.

Where the property is "movable, tangible property, such as horses, cattle, wares and merchandise, the foreign administrator cannot sue for their recovery from want of title. The same want of title prevents any recognition of his transferee:" *Dial v. Gary*, 14 S. C., 573.

But it has been said that "an assignment by an administrator of a chose in action in the State where he is appointed, and which is good by its laws, will enable the assignee to sue in his own name in any other State, by whose laws the instrument would be assignable, so as to pass title to the assignee, and enable him to sue thereon:" Story's Conf. of Laws, § 359. *Trecothick v. Austin*, 4 Mason, 16 (opinion by Story), was cited as being founded on this doctrine, although it is no authority for such a proposition. There are cases, however, in the United States which do maintain such a rule. In *Wilkins v. Ellet* (1882), 108 U. S., 256, Mr. Justice GRAY said: "The administrator, by virtue of his appointment and authority as such, obtains the title to promissory notes and other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator, and may sell, transfer and endorse the same; and the purchasers may maintain actions in their own names against the debtors in another State, if the notes are negotiable promissory notes, or if by the law of the State, the assignee of a chose in action may sue in his own

name." This was but a re-statement of the law, established in the same court in *Harper v. Butler* (1829), 2 Pet., 239. An executor assigned a note which was payable to the deceased absolutely, without any negotiable words. It was decided that the debtor might be sued in another State, if, by the law where the assignment was made, the legal title passed, and by the law of the *forum*, the assignee could sue in his own name.

This was the first case in which such a doctrine was promulgated. No counsel appeared for the defendant, no authorities were cited by counsel or the court, and the opinion is very meagre. *Andrews v. Carr* (1853), 26 Miss., 579, and *Owen v. Moody* (1855), 29 Miss., 79, follow the same principle upon a like form of contract, but the former is as unsatisfactory as *Harper v. Butler*.

Leake v. Gilchrist (1829), 2 Dev. (N. C.), 73, went broadly on the ground that debts due by *specialty* are assets for administration wherever the specialty is found. In admitting the right of the assignee of a foreign administrator to sue, it was remarked that, the evil of permitting a withdrawal of the assets out of the State to the inconvenience of creditors, could only arise in this class of debts, and could not be alarming; because they formed usually but a small portion of the assets of an estate. *Grace v. Hannah* (1858), 6 Jones' Law, 94, and *Smith v. Tiffany*, 16 Hun., 552, are parallel decisions.

A chose in action, by its very name, signifies a thing or property of which the owner has not the possession, but merely a right of action for its possession: 2 Bl. Com., 389; *Dial v. Gary*, 14 S. C.,

573. The idea contains two elements, the property itself and the right to obtain possession of the property. An instrument which shows the title in the owner, is but a representative or shadow. This evidence of the property may be in one jurisdiction, the property in another: *Dial v. Gary*, 14 S. C., 573.

The English law, as between country and country, recognizes the distinction: *Whyte v. Rose* (1842), 3 Q. B., 493; *Wharton's Confl. of Laws*, § 615; *Foot's Int. Jus.*, 2d ed., 279. An American case also accords with this view. The question was, whether the plaintiff, a holder of a bond, purchased by him from a foreign domiciliary administrator, had the legal right to sue the debtor in South Carolina: "*SIMPSON, C. J.*, in delivering the opinion of the Court, said: The chose or thing is situated in South Carolina, and the evidence of right to sue, at the death of the intestate, was in Massachusetts, but that right could not have been exercised in that State even by the owner of the bond himself, at least, so long as the debtor continued in South Carolina, and according to strict law, ought to be subject to administration in South Carolina: *Dial v. Gary* (1880), 14 S. C., 573.

In *Peterson v. The Chemical Bank* (1865), 32 N. Y., 21, the point was as to the right of a foreign executor to assign a debt, due by the defendant bank to his testator, and evidenced by a bank book. The contract was so drawn as to indemnify the assignee of the fund for any expenses incurred in its collection, the design being to avoid the founding of an administration in the State where the bank

was situated. *DENIO, C. J.*, who delivered the opinion, considered the disability of the foreign executor to sue, as attaching to his person and not to the subject matter of the action, and sustained the suit.

The effect of the instrument depends on the attitude of the sovereignty in which the property is situated. Because an instrument is negotiable in both the country of the contract and the country of the *forum*, and in the country of the *forum* the assignee of a "lawful man" (*Pollock on Contracts*, 49), is entitled to sue in his own name, it does not follow that an administrator may transfer an enforceable title: See *Yeomans v. Bradshaw*, *Carth.*, 373; *Dial v. Gary*, 14 S. C., 573; *Thompson v. Wilson*, 2 N. H., 291; *McCarthy v. Hall*, 13 Mo., 480; *Slocum v. Sanford*, 2 Conn., 533; *SHERWOOD, J.*, in *Reynolds v. McMullen*, 55 Mich., 568; *Stearns v. Burnham*, 5 Greenl. (Me.), 261. To maintain such a doctrine would "defeat the great object of each State or government retaining control over the property of an absent decedent, the rights of domestic creditors might be wholly destroyed, and the laws providing local administration under local authorities for the protection of such creditors eluded and overthrown:" *SIMPSON, C. J.*, in *Dial v. Gary*, 14 S. C., 573; *SHERWOOD, J.*, in *Reynolds v. McMullen*, 55 Mich., 568; *Stearns v. Burnham*, 5 Greenl. (Me.), 261. The transferee would be given a greater right than he from whom title was obtained. The principle of law that, a person by an execution of a power, may often confer an enforceable title where he himself could not have sued (see *Rand v. Hubbard*, 4 Met.), does not apply:

Dial v. Gary, 14 S. C., 573. A personal representative is of an artificial *status* peculiar to himself, which can neither be compared to the *status* of infants, married women, lunatics, corporations or assignees in bankruptcy: (As to assignees in bankruptcy, see Goodwin v. Jones, 3 Mass., 517.) No distinction between executors and administrators can be made. That fanciful idea must be fully answered by the inability of a government to give its grant of letters testamentary any extra-territorial effect: Story's Conf. of Laws, § 512.

These considerations would exclude all contracts of an administrator for the transfer of assets of the estate not reduced to possession and in a foreign jurisdiction. Nor do the decisions limit the extent of their application. But due regard to the peculiar character internationally conceded to promissory notes and bills of exchange payable to *order* or *bearer*, makes an examination of their practical operation desirable. According to the *Lex Mercatoria* adopted by England, "the absolute benefit of the contract is attached to the ownership of such instruments, which according to the ordinary rules would be only evidence of the contract. The proof of ownership is then facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers. Finally, this proof is dispensed with by presuming the *bona fide* possessor of the instrument to be the true owner" (Pollock on Contracts, § 17).

The English case cited by Story in § 517 of "Conflict of Laws," to support his theory of a personal representative being capable of giving an assignee of such instru-

ments an enforceable title against a foreign debtor, is McNeillage v. Holloway (1818), 1 B. & A., 218, deciding that a husband is entitled to sue alone on a bill of exchange given to his wife before marriage, an analogy being drawn between such instruments and personal chattels. But another and later English case also cited, Richards v. Richards (1831), 2 B. & Ad., 447, does not maintain the chattel-like quality. The American authorities relied on by Story are Robinson v. Crandell (1832), 9 Wend., 425, and Barrett v. Barrett (1832), Greenl. (Me.), 353. In Barrett v. Barrett an administrator in New Hampshire sued in his own name on a note drawn in favor of his intestate and endorsed by him in blank. The jury found substantially, the suit to have been brought for the benefit of the estate. But the Court considered the question as one for the application of the ordinary rules governing such notes, and the circumstance of the plaintiff really being a trustee, a fact which could not affect the liability of the defendant. And it was said, *if any matter of off-set existed against the estate it might be availed of in defence of the action, on the theory that the plaintiff took with notice of such equities.*

In the New York case of Robinson v. Crandell, decided in the same year, SUTHERLAND, J., said: "The notes being payable to *bearer* and the payee having died in Pennsylvania, admitting the plaintiffs to have been his administrators there, and in that manner to have obtained possession of the notes, I see no legal objection to their maintaining an action upon them in their own names as bearers. As

administrators they could not sue here. Letters testamentary or of administration granted abroad give no authority to sue here; we take no notice of them. But being the real owners of the note they had a right to declare as bearers and recover in that character. A mere agent having a note of his principal, payable to bearer, may sue on it in his own name, and it does not lie with the defendant to object to the plaintiff's want of interest."

The benefit of the exception of promissory notes overcoming the rule that on a decedent's death debts acquire the *situs* of the debtor, together with the policy which such a rule embodies seems, therefore, to be reasoned on the doctrine that in a suit on a note payable to bearer, suing for the advantage of another does not alter the principle of liability.

Before discussing whether any other than Story's idea is practicable, the other cases bearing on the question in the United States will be considered.

Robinson v. Crandell and *Story's* § 517, "Conflict of Laws," as applied to notes and bills payable to *bearer* are sustained by *Knapp v. Lee* (1879), 42 Mich., 41; *Sandford v. McCreedy* (1871), 28 Wis., 103; *Wharton's "Conf. of Laws,"* § 615. In *Campbell v. Brown* (1884), 64 Iowa, 425, the endorsement was from the executor to a third person, who was legatee of the notes under a will. And *Giddings v. Green* (1880), 4 Hughes, C. Ct., 446, permitted foreign executors to sue as such and to subject a piece of land to the lien of purchase money. This last case is certainly much broader than Story's idea of the law, and no other authority can be found where the character of an

instrument which was the property of the decedent altered the disability of the foreign administrator to sue: See § 512, Story's "Conf. of Laws.

Where an administrator has actual possession of a note or bill payable to *order*, Story maintains the chattel nature of the instrument should permit him to invest his transferee with an absolute title: *Conf. of Laws*, § 517; see also *Rand v. Hubbard*, 4 Met., 14; *Goodett v. Anderson* (1881), 7 Lea (Tenn.), 286; *St. John v. Hodges*, 9 Bar. (Tenn.), 334.

Thompson v. Wilson (1820), 2 N. H., 291, recognized and applied the opposite rule. Debts due on simple contract were said to be *bona notabilia* where the debtor lived, and consequently the foreign executor had no interest to assign. The same idea was more clearly expressed in *Stearns v. Burnham*, 5 Greenl. (Me.), 261: "The power of this executrix, by law, is to administer all the goods, chattels, rights and credits which are within Massachusetts. Debts due to the testator, at the time of his death, from persons residing in other States, are placed by law on the same grounds as goods and chattels belonging to him and being in another State. Once there she, as executrix, deriving her authority under the laws of Massachusetts, has no control. We are then led to inquire how an executor or administrator, acting under the authority derived from another State, can, by indorsing a note due from one of our citizens, give to his endorsee a power which he himself does not possess; that is, of successfully suing and recovering in our courts. If this can be done it will be an indirect mode of giving op-

eration, in this State, to the laws of Massachusetts, as such; or in other words, authority derived directly from her laws, which are not in force in this State. By adopting such a principle, the effects or credits of a testator or intestate found in this State might be withdrawn, which may be necessary for satisfying debts due from such testator or intestate to citizens of this State."

In *McCarthy v. Hall*, (1850) 13 Mo., 480, RYLAND, J., added, "Were our courts to permit the executors or administrators of a foreign State to sue or maintain actions on notes and bonds due to their testators or intestates by the citizens of our State, or to permit their assignees to sue, all the effects, goods and chattels, of such testators or intestates might thereby easily be withdrawn from our jurisdiction to the prejudice and injury of our citizens. Such is never suffered or permitted. It is our duty to guard the interest of our own citizens, to look well to our own household first. *Nostrum jus, magis quam jus alienum, servemus.*"

So in Connecticut, where suit was brought by an administrator on a note payable to the intestate or order, a payment to the ancillary administrator at the domicile of the debtor was held a discharge as against a subsequent suit by the principal administrator who held the note: *Slocum v. Sanford*, 2 Conn., 534. See also the opinion of SHERWOOD, J., in *Reynolds v. McMullen*, 55 Mich., 568.

Gove v. Gove, 64 N. H., 503, however overruled the principles stated in *Thompson v. Wilson*, 2 N. H., 291, and *Barrett v. Barrett*, 8 Greenl. 346, makes no mention of *Stearns v. Burnham*, 5 Greenl., 261, although upon an almost similar point.

Riddick v. Moore (1871), 65 N. C., 382, presents a phase of this question. The administrator in Virginia sent a note to an agent in North Carolina, who there assigned it to the plaintiff. PEARSON, C. J., in delivering the opinion of the Court, said: "While the note could not be sued on by the Virginia administrator, yet for all matters *in pais* he had a right to send it to North Carolina for sale and assignment. In deducing title the letters of administration granted in Virginia and the assignment though made in North Carolina had the same legal effect as a bill of sale for a horse, executed in North Carolina, had he sent the horse to North Carolina and sold it as he did the note." *Lucas v. Bryne* (1871), 35 Md., 485, only differed from this last case in that the administrator in his fiduciary character transferred the note to himself in his personal character in the State where suit was brought.

It is difficult to sustain the correctness of the contract principles involved in the last two cases. The power of an administrator is confined to the jurisdiction of his appointment, and, therefore, his contracts in a foreign State as administrator must lack that quality, since it is impossible to completely dispose of the contract necessary to transfer the instrument, in the chattel quality of the instrument. In both these cases the contract was made in a State foreign to the qualification. In the latter, the jurisdiction of the contract is express. In the former, although the agency would be governed by Virginia law, the contract of the principal through the agent would be regulated by the law of North Carolina.

In *Rand v. Hubbard*, 4 Met., 252,

several questions were suggested as making the *situs* of the debt that of the debtor impossible of application to bills of exchange and promissory notes. It was asked: If an endorsement can only be made by an executor or administrator appointed and authorized in the State where the debtor dwells, what is an endorsee to do who holds a note with a promissor and several endorsers living in different States? Must it be endorsed by one administrator so as to give a right of action against the promissor, and by another administrator so as to give a right of action against each endorser?

The title of an administrator who has a right of action to a fund is certainly stronger than the title of one who has no such right. When the fund is received by the administrator from the sale of the note it becomes an asset of the estate in his jurisdiction. If on failure of payment by the promissor the transferee should sue the administrator on his contract of endorsement, the position of the administrator would be the same as if the other rule were to be applied. The liability of the other endorsees to the holder of the note should be no less; for the administrator, should they alone be sued, still holds the fund obtained from the sale of the note as an asset to be used in the satisfaction of debts or the payment of legacies.

Where a note is payable to *order* a prospective purchaser would be charged with notice of its being an asset of the estate, since the right to receive payment would appear in the decedent and the endorsement be made by another person. But if the note was payable to *bearer*, it is clearly possible for a

holder to be entirely without notice of the personal representative being in the chain of title, and against such a holder that circumstance could not defeat a recovery.

In bills of exchange another contingency is developed. The bill may not have been presented. Until acceptance, therefore, it would be impossible to relegate the *situs* of the note to either the jurisdiction of the drawee or the drawer. The *drawee* would be protected in accepting and paying the bill to an administrator appointed in *his* jurisdiction, and there is no reason to suppose that the same rule would not apply, were payment to be made to his endorsee: *Att.-Gen. v. Pratt*, L. R., 9 Ex., 140.

According to *Yeomans v. Bradshaw*, Carth., 373, however, presentment does not have to be made by the administrator deriving his appointment from the country of the *drawee*. And by the same case suit could only be brought against the *drawer* by the administrator recognized in his jurisdiction.

The drawee of a bill held by a foreign administrator or his transferee, to protect himself should, therefore, always decline to accept the draft, unless the rule obtains within the country where such presentment is made that, a voluntary payment to such an administrator is a good discharge in the absence of local administration.

While a doctrine of notice as applied to this question is not known to have been announced by any authority, it seems a not impracticable solution. That there must be something wrong with the chattel idea of Story is readily discernible when the effect of a collateral security is considered.

Bonds of governments, bonds and

stocks of corporations and real securities are often given as collateral security for the principal debt.

Where the bonds of a government pass freely from hand to hand without any additional transfer in the country from which they have been issued, they are practically money, and had Att'y-Gen. *v. Bouwens*, 4 M. & W., 171, not compared such instruments to foreign bills of exchange, there seems little doubt that Westlake (*Westlake's Priv. Int. Law*, § 88), would not have considered § 517 Story's "Conf. of Laws," to be the law of England. (Foote does not, however, seem to entertain this view. See Foote's *Int. Jus.*, 2d ed., 282.) Should the additional transfer be necessary the *situs* of the asset is deemed to be the *situs* of the debtor. Att'y-Gen. *v. Dimond*, 1 C. & J., 356; Att'-Gen. *v. Hope*, C., M. & R., 530; 8 Bligh, 144.

New York conforming to the principle subsequently expressed in *Peterson v. The Chemical Bank*, 32 N. Y., 21, took the opposite view of the stock of a corporation: *Middlebrook v. Merchants' Bank*, 27 How. Pr., 474. Throughout the United States the bonds of the United States Government have no particular *situs*, *Vapghan v. Northup*, 15 Peters, 1; *Shakespeare v. Fidelity Ins. Co.*, 97 Pa. St., 173.

The nature of mortgages depends on the law of the State where the land is situated. STORY says (§ 424 *Conf. of Laws*): "The general principle of the common law is, that the laws of the place where immovable property is situated, exclusively govern in respect to the rights of the parties, the modes of transfer and the solemnities which should accompany them. The title, therefore, to real property can be

acquired, passed and lost only according to the *lex rei sitæ*.

In *Cutler v. Davenport*, 1 Pick. (Mass.), 81, the question was as to the effect of an assignment of a bond and mortgage by a foreign administrator, and it was decided that, although for certain purposes the transfer might be considered as an assignment of a chose in action, with collateral security for its payment, yet as the land might eventually be held as an absolute estate under the mortgage, should it be foreclosed, the conveyance was necessarily sufficient to transfer the land. And that in the transfer of land which is governed by the *lex sitæ*, the foreign administrator would not be recognized. (See also *Reynolds v. McMullen*, 55 Mich., 568, where the same principles were applied, the question being similar, except that statute law distinguished between foreign personal representatives and those in Michigan although not upon the express case.)

New Hampshire and New York have considered mortgages mere personalty capable of transfer by a foreign administrator, and the Texas case forming the subject of the annotation takes the same position with regard to the deed of trust. *Gove v. Gove* (1886), 64 N. H., 503; *Smith v. Tiffany* (1879), 16 Hun. 552, and *Solinsky v. Fourth Nat. Bk.*, 17 S. W. Rep., 1050.

In *Doolittle v. Lewis* (1823) 7 John's Ch., 45, an administrator in Vermont held a bond secured by a mortgage on lands in New York. The mortgage contained a power to the mortgagee, his executors, administrators and assigns in case of default in payment, to sell and convey the premises according to the laws of that State. Chancellor

KENT held this clause to be a special power given by the mortgagor, not derived from any court in another State, and authorized its execution in New York by a personal representative of the mortgagee appointed in Vermont, where the mortgagee died, saying, the power and the execution of the power were a matter of private contract between the parties and not of jurisdiction. (See also *Averill v. Taylor*, 5 How. Pr., 476, and *Hayes v. Frey* (1882), 54 Wis. 503, where this doctrine was adopted.)

Where the instrument representing the principal debt may be transferred but the collateral security is incapable of transfer except by a local administrator, a curious question arises as to what right the transferee has to enforce the principal security. Surely this fact should not overthrow the theory on which the contract of a foreign administrator is permitted to invest his assignee with an enforceable title to a negotiable security. Nor should it be capable of the same influence on the chattel idea announced by STORY in § 517 Conflict of Laws. It is significant that the cases in which the promissory note had no collateral security were all founded on the chattel doctrine. But in those in which a mortgage existed to secure the debt, the contract rule was adopted. *Campbell v. Brown* (1884), 64 Iowa, 425; *Gove v. Gove*, 64 N. H., 503. In *Cutter v. Davenport*, 1 Pick., 81, the question was before the Court and was suggested by counsel, but the opinion merely decided against permitting a foreign administrator to transfer a mortgage on land in Massachusetts, without noticing the effect of their action on the principal obligation which the

mortgage was given to secure. The contingency seems to have impressed the Supreme Court of South Carolina in *Dial v. Gary*, 14 S. C. 573, for in the face of a tendency on all sides to follow STORY, the nature of a bond was considered and an opposite view taken.

In *Reynolds v. McMullen*, 55 Mich., 568, the tactics of the Court in *Cutter v. Davenport* were pursued by all but SHERWOOD, J., who attacked the chattel character of a promissory note as the Court in South Carolina did the bond. The question was as to the right of the administrator of a decedent in Missouri to assign a note with a mortgage on land in Michigan, where the debtor resided, given to secure it. He said: "The real question in this case, upon the facts appearing upon this record, is this: Were the debts, owing by persons residing in this State to the deceased, assets to be administered by the Court in Missouri, or by the Court in Michigan? "By the common law debts due by specialty are esteemed to be the goods of the deceased where the securities are at the time of his death; but debts due by simple contract follow the person of the debtor, and are regarded as the goods of the deceased where the debtor resides at the time of the creditor's death: 3 Bac. Abr. (Wils. ed. (37-8; Toller's Law of Executors, 55; 1 Wms. Saund., 274, note 3; *Speed v. Kelley*, 2 Am. Rep., 553; *Wyman v. U. S.*, 29 Alb. Law J., 194; *Slocum v. Sanford*, 2 Conn., 534. "I am unable to see any good reason for the distinction made between debts by specialty and by simple contracts, or why they should not all be deemed assets to be administered at the same place. The proceeds after the payment of

debts have all to be distributed according to the law at the domicile of the deceased; but such is the law as we find it, and a change is for the legislature, and cannot properly be made by this Court. There can be no question but that the note was a simple contract debt and subject to the law applicable to that kind of claims: *Slocum v. Sanford*, *supra*; 2 *Cooley's Bl. Com.*, 510." "This Court has already decided that the debts in this State due to a person resident in another State, dying there, can only be enforced by an executor or administrator duly appointed here: *Vickery v. Beir*, 16 Mich., 50; *Thayer v. Lane*, Walk. Ch., 200; and such is the rule at common law: *Story's Conf. Law*, §§ 513, 514 and cases cited. The assignee of these claims, due from the debtor's in this State, stands in no other or better position than did the public administrator who made the assignment to him, and could confer no rights which he did not possess: *Chapman v. Fish*, 6 Hill, 554; *Thompson v. Wilson*, 2 N. H., 291, and payment to him is no defence to this suit: *Dissoway v. Carroll*, 4 Lans., 191; *Vaughn v. Barrett*, 5 Vt., 333; *Pond v. Makepeace*, 2 Met., 114; *Riley v. Riley*, 3 Day, 74; *Glenn v. Smith*, 2 Gill & J., 493; *McLean v. Meek*, 18 How., 16. The proper place for administering such assets must necessarily be where alone payment can be enforced against the debtor. I can come to no other conclusion upon the facts appearing upon this record. "It necessarily follows that the note and mortgage were assets to be administered in this State, and that the public administrator in St.

Louis acquired no right to sell or dispose of the same in that State to any person, or any right to the possession or control of the note and mortgage, further than to safely keep them and deliver the same to the administrator here required, until after the estate in Michigan was settled and the debts there were paid: 2 *Kent's Com.*, 433, 434; 2 *Bl. Com.*, 509; *Bac. Abr. 'Executor' E.*; *Byron v. Byron*, Cro. Eliz., 472; *Hilliard v. Cox.*, Ld. Raym., 562; *Salk.*, 37; *Whart. Conf. Laws*, § 604.

"There is no doubt but that an executor or administrator may lawfully sell the personal estate of the deceased, unless prohibited at public or private sale without the order of the judge of probate, within the jurisdiction of the Court where such property is assets in his hands for administration. He may do so even at a discount, though the property sold be notes and mortgages: *Burt v. Ricker*, 6 Allen, 77; 3 *Redf. Willa.*, 226, 229, 236; and the purchaser will take a good title thereto, provided the property was assets within the control and jurisdiction of the Court where administration was granted. He cannot make such sale, however, when he has not the right to enforce collection: *Yeomans v. Bradshaw*, Carth., 373; *Tourton v. Flower*, 3 P. Wms., 369; *Isham v. Gibbons*, 1 *Bradf. Sur.*, 69; *Story on Conf. Laws*, §§ 512, 513, 514, 515a, 522, 523; *McCarthy v. Hall*, 13 Mo., 480; *Chapman v. Fish*, *supra*; *Goodwin v. Jones*, 3 Mass., 514; *Riley v. Riley*; *supra*; *Stearns v. Burnham*, 5 *Greenl.*, 261; *Harrison v. Sterry*, 5 *Cranch*, 289; *Dawes v. Head*, 3 *Pick.*, 138; *Harvey v. Richards*, 1 *Mass.*, 423; *Glenn v. Smith*, *supra*;

Vaughn *v.* Barret, *supra*; Lee *v.* Havens, Brayt., 93; Thompson *v.* Wilson, 2 N. H., 291; Judy *v.* Kelley, 11 Ill., 211; Willard *v.* Hammond, 21 N. H., 382; Smith *v.* Guild, 34 Me., 443; Langdon *v.* Potter, 11 Mass., 313; Rorer Interstate Law, 248; Speed *v.* Kelly, 59 Miss., 47; Owen *v.* Miller, 10 Ohio St., 143; Abbott *v.* Coburn, 28 Vt., 663; Vaughan *v.* Northrup, 15 Pet., 1; Noonan *v.* Bradley, 9 Wall, 394; Willits *v.* Waite, 25 N. Y., 577; Valle *v.* Fleming, 19 Mo., 454."

The greater number of direct decisions must be conceded to agree with STORY, both as to the rights of a foreign administrator of bills and notes, payable to order or bearer, and to the effect of the contract to transfer any other negotiable instrument. Peterson *v.* The Chemical Bank, 32 N. Y., 21, shows the extreme the latter doctrine can be legitimately carried to. The more frequent chance for the use of the former, is as dangerous, as the extreme of the latter.

No case has been found where the accident of local *creditors* or local *administration* has been said

to alter the rule of liability. On the contrary, in Peterson *v.* Chemical Bank, 32 N. Y., 21, the exceptional feature of no local *creditors* was considered as not changing the principle. The express observation in the leading case of the fact that no domestic claimant for the fund has been *proved* on the trial, seems suggestive of such a circumstance being vital in Texas. The adoption of such a doctrine, however, would embarrass the already complicated condition of this branch of the law.

Judgment against one administrator is no evidence of a debt against another, a parting reason for the maintenance of the rule, "debts follow the debtor," in the international law of decedent's estates: Talmage *v.* Chapel, 16 Mass.; Slan-ter *v.* Cherworth, 7 Ind., 211; Taylor *v.* Barron, 35 N. H., 484; Low *v.* Bartlett, 8 Allen, 259; Jones *v.* Jones, 15 Tex., 463; Price *v.* Mace, 47 Wiss., 23; Brodie *v.* Bickley, 2 Rawle, 231; McLean *v.* Meek, 18 How., 16; McGarvey *v.* Darniel, 32 Ill. App., 226.

MAURICE G. BELKNAP.

EDITORIAL NOTES.

By W. D. L.

MUST A SOCIAL CLUB TAKE OUT A LICENSE?

THE annotation by Mr. LONGSTRETH in this number of the AMERICAN LAW REGISTER AND REVIEW on the case of *Com. v. Tierney*,¹ shows the conflict of opinion in the courts of different States on the question whether a *bona fide* club is obliged, under the liquor laws, to take out a license before it can sell liquor to its members. In all the States we have Acts requiring that no one shall sell liquor without a license. The word *sale* itself appears in the license laws of almost every State in the Union. It would naturally suggest itself to any one looking at this subject for the first time, that the terms of the statutes should be interpreted in accordance with the general purpose of the Act. This purpose, which the judge must gather from the provisions of the statutes taken as a whole, is the key by which alone the meaning of each section can be interpreted. And yet if we examine the opinion in the cases upholding the view that a club cannot sell to its members without a license, we find them almost entirely taken up with the question whether the act of the steward of a club, in handing a member a glass of wine, the member paying money therefor, is technically a sale.² In fact, the universal attitude of the Appellate Courts, which have held that a club must take out a license, has been, that the whole question hangs on the decision of what is technically a sale. And though one judge has taken the trouble to point out that the purpose of the license

¹ *Supra*, p. 861.

² *State v. Easton*, 20 At. Rep. (Md.), 782 (1890); *State v. Essex Club* 20 At. Rep. (N. J.), 769 (1890); *People v. Andrews*, 115 N. Y., 427 (1889); *Kas. v. Horacek*, 41 Kas. 87 (1889); *State v. Lockyear*, 95 N. C., 633 (1886); *Martin v. State*, 59 Ala., 35 (1877); *Rickart v. People*, 79 Ill., 85 (871); *State v. Mercer*, 32 Iowa, 405 (1871).

laws would be defeated if men were allowed to form themselves into clubs and sell liquor to each other, even he has omitted critically to discuss the real purpose of the license laws.¹

There is only one thing more remarkable than this picking out of a particular word in a statute, and defining its technical legal meaning, and that is, that any one who adopted this attitude toward the license laws, should have arrived at the conclusion that a change of ownership for a money consideration between the club and an individual member was not a sale. Yet this was what was done by an English judge, Judge FIELD, in *Graff v. Evans*.² The learned judge held that the sale to a member was only a transfer of special property in the goods and not a sale. In other words, that the act of changing my ownership from one-tenth or one-hundredth interest in a subject of property, as a "tenant in common" with my co-members, to a complete ownership for a money consideration is not a sale. The reasoning which led to such a conclusion was easily picked to pieces by the American judges,³ and it therefore rather adds to than detracts from the strength of the opinion that a club cannot sell without a license.⁴ The sale of wine to a member of a club has been compared to a sale to the stockholder of a railroad company of a ticket on the train. As far as the technical question of sale is concerned, we are unable to see any distinction between them.

Indeed, if the club is incorporated there is not even an apparent difference between the sale by the corporation organized for pleasure to its members, and the corporation organized for profit to its members. When, however, the club is a mere association or partnership there may be some

¹ Opinion of Judge PENNYPACKER, *Comm. v. Tierney*, 1 Dist. Rep., 17 (1892). This opinion contains the best and fullest statement of the position that clubs cannot sell liquor without a license.

² L. R. 8 Q. B., D., 373 (1881).

³ See especially opinion of VAN SYCKEL, J., in *State v. Essex Club*, 20 At. Rep. (N. J.), 769 (1890).

⁴ Opinion of PENNYPACKER, J., in *Comm. v. Tierney*, 1 Dist. Rep., 17 (1892).

apparent difference. If the members are partners in the liquor consumed by the members no action for the price of the liquor will lie at common law. Practically, the only method of recovery would be by bill in equity for an account and distribution of the assets of the partnership. But though a learned judge has intimated to the writer that the fact that a club was incorporated might make a difference in his decision, should the case come before him, it does not appear to us that an accident of practice—and the rule that one partner cannot sue another is nothing but an accident of practice—should affect this question of “what is a sale.” Incorporated or unincorporated, in both cases there is a passage of title for a money consideration; in both cases the drinker exchanges a title giving him qualified rights to a fractional undivided part of the whole stock, to a title giving him complete control over a particular glass of liquor.

But the primary questions are—first, what is the object of our State license laws? and second, what is the method or methods by which this object is sought to be attained? The object, of course, is to discourage intemperance. The method by which this ultimate object is attained, which is, of course, the important point, can be seen both from what the statutes do make criminal, as well as from what they prescribe.

Now, a man can drink himself drunk as often as he wants to in the strictest prohibition State in the Union. The open drunkenness may be a misdemeanor, but the act of drinking liquor *never*. Neither does any State attempt to regulate the place where a man can drink. One can drink a glass of beer in a street in Boise City with as much respect for the letter and spirit of any law of the State of Iowa as one could in a bar-room in New York City. But the license laws and the prohibition laws do attempt to restrain the business of liquor selling. Many statutes contain the words, “trading in liquors . . . by selling the same.” And we doubt not that any of the courts which now hold clubs must have licenses would convict a man of “selling liquors” under the acts who bartered wine

for groceries, though according to BENJAMIN, bartering is not a sale.¹

Now the criterion of a business is that the conduct of it is for profit; actual profit is not necessary, but that profit was the direct or indirect object proves that the transaction is a business transaction. It is the business of the retail sale of liquor without a license which our Licensing Acts mean to prohibit.

The question, then, is: Do clubs engage in the business of selling liquor? It seems to us that the subject of clubs and the license laws will never be cleared of the doubts which now hang about it until we clearly understand the difference between a club and company or business corporation. A club is an organization for the purpose of giving its members certain things at cost. A company is an association for the purpose of profit, which profit, in the shape of money, is handed over to the members according to the relative amount of capital they have contributed. To make my meaning clear: The managing board of a club agrees to furnish its members with things they can enjoy in common, such as a house, chairs and books, at an assessed valuation of so much a year, and food, drink, etc., which the members of course cannot enjoy in common, at a set price for a definite quantity. Now it is true that money may be made off food and lost in drink, or *vice versa*, but on the average the total pleasures which a man gets out of his club cost the association, as a whole, exactly what he pays for them. This being the principle of a club, and no member being interested in the amount of another member's expenditures at his club, no club transactions between its members can by any ingenuity be termed "carrying on a business," though there may often technically be a sale between the club and one of its members. This, of course, is not saying that an association which as between its members is a club, cannot enter into business. Selling liquor or giving theatricals for money to outsiders is just as much a business as if the profits were divided among the members. On the other hand, it is not neces-

¹ Benjamin on Sales, Sect. 2, 6th Ed.

sary that a club should have a common room, etc. The criterion depends on the association to furnish pleasure to the members at cost. The kind of pleasure is immaterial. The fact that liquor alone was furnished might be a suspicious circumstance which, taken with others, such as that incidental profits went to the steward, would justify a jury in looking at the "club" as a device to evade the license laws.¹ But if it is *bona fide* we see nothing in the license laws of our own or other States to prevent men combining together to purchase liquor and afterwards distributing the same at cost on a prearranged plan. That the legislatures of our States could prevent the buying of liquor in common by two or more people, or the subsequent distribution without a license, may be admitted. But to put such a strict interpretation on an Act would require very plain language. If the legislature had thought it necessary for a club to obtain a license they would have enabled reputable clubs to obtain licenses. But in Pennsylvania, at least, by requiring an applicant to affirm that no one besides himself is interested in the sale, and that the place is necessary "for the accommodation of the public," they have put it out of the power of clubs to obtain licenses. Judge PENNYPACKER, in his able opinion, has considered it extremely probable that the legislature meant to require the members of a club when they wanted to drink at the club, to send to the nearest tavern. But if this is so, would it not look like legislation to encourage the business of selling intoxicating liquors at retail?

Lastly, in interpreting license laws it seems to us that courts sometimes forget, in their commendable eagerness to give effect to legislation whose general object is meritorious, that they are interpreting a criminal statute, frequently making acts crimes which before were innocent, and that one of the best rules of our law is, that such statutes should be construed strictly. These words "construed strictly" if they mean anything should prevent courts applying the prohibitions of a penal statute to new and doubtful cases.

¹ Op. Com. v. Tierney, 1 Del. Rep., Pa., p. 22.

BOOK REVIEWS.

A MANUAL OF MEDICAL JURISPRUDENCE AND TOXICOLOGY. By HENRY C. CHAPMAN, M.D. 12mo., p. 237. With Thirty-six Illustrations, some of which are in colors. Philadelphia: W. B. Saunders, 1892.

We have examined this manual with much interest and on the whole are favorably impressed with it. Its statements so far as they relate to the medical side of the subject, seem, so far as we have examined them, to be concise and accurate, and the advice given to medical men respecting their duties in medico-legal cases is judicious in every respect save where the author enters upon the domain of the law as distinguished from medicine. Judging from the published works on this subject, it seems to be the opinion of medical men writing upon medical jurisprudence that no previous training is required in order to render one competent to treat the legal questions involved. The medical man, however, who acts upon the advice given upon page 20 and refuses to answer questions put to him by counsel on the ground that they involve professional skill, will be very apt to find himself in trouble according to the rule in most of the States. (See *ex parte* Dewent, 53 Ala., 389; *Summers v. The State*, 5 Tex. App., 365; *Wright v. People*, 112 Ill., 540.)

Again on page 23 the author has invested the coroner with rather more power than accords with our notions of the law on the subject, but here the advice will work no harm to the physician.

On page 138 the rule is erroneously stated that the paternity of a child is to be determined by the likeness of the child to the alleged father. This point has been more than once decided in this country. (See *Hanawalt v. The State*, 64 Wisc., 84.)

On page 143 the question of survivorship is left in an unsatisfactory condition, and a student would very likely

gather an incorrect opinion from the text. (See *Wing v. Anrave*, 8 H. L. Cas., 183; 8 *Law Quarterly Review*, 266.)

Again on page 167 the question as to the legal test of insanity is not satisfactorily treated. The rule laid down in the leading cases of *State v. Pike*, 49 N. H., 399; 50 Id., 369; and *Parsons v. The State*, 81 Ala., 587, should have at least been referred to. The recent edition of Taylor's "Medical Jurisprudence," by Clark Bell, p. 729, contains a full citation of annotations upon this important question, and is a much safer guide upon legal questions than the work we are considering.

Notwithstanding these blemishes, however, the work will be found convenient in many respects, provided the student does not rely upon it as a guide to the solution of merely legal questions.

We notice some evidences of careless proof-reading—*e. g.*, on page 33, where "verdict" is spelled "virdict;" but the book as a whole is well printed.

MARSHALL D. EWELL, M.D.,
The Kent Law School, Chicago, Ill.

A MANUAL OF TRADE-MARK CASES, COMPRISING SEBASTIAN'S DIGEST OF TRADE-MARK CASES, WITH NOTES AND REFERENCES. BY ROWLAND COX. Second Edition, revised and enlarged. HOUGHTON, MIFFLIN AND COMPANY, The Riverside Press, Cambridge, 1892.

The fact that a second edition of Mr. COX's adaptation of SEBASTIAN'S Digest of Trade-mark Cases to the needs of the American Bar is appreciated by the profession is shown by the call for this second edition. Mr. SEBASTIAN'S object in his English work was, as stated by himself, "to present a concise statement of facts and decisions in all cases connected with the law of trade-marks and kindred topics, as ascertained by a careful comparison of all the various reports in which each case appears." In pursuance of this purpose the author gave a short, clear statement of each case, and well-selected quotations from that portion of the

Opinion of the Court which dealt with the reason for the decision. There were 655 cases reported by the English edition; Mr. COX in his first edition of 1886 added twenty cases to Mr. SEBASTIAN'S work, and while wisely using his excellent index, added to the text cross references and occasional notes. In his present edition Mr. COX has added fifty-six new cases and continued his system of notes and cross references, besides adding several excellent *fac similes* which illustrate the question of infringement.

We are sorry to see, however, that he has departed from the plan of the English author in two respects. In the first place, Mr. COX has given a report of a case rather than a complete digest. This forces him to omit many cases, and the lawyer no longer feels that he can turn to the volume and obtain, in a short time, the elements of all the trade-mark cases. This was the object of the English author. He did not intend to show the development of the law. Had he done so, the chronological order which he adopted and which Mr. COX has followed would have been modified so as to illustrate the development of each branch of the subject separately. He would also have made a much fuller report of each case. The work was not intended to supply a student of the subject with all the material, but rather to show him what cases he should read in full. We must all thank Mr. COX, however, for what he has done, even though we may regret that the original plan was not followed more closely. He has greatly increased the usefulness of Mr. SEBASTIAN'S work to the American practitioner, and we feel sure that time will bring with it a necessity for a third edition.

We presume that Mr. COX has the English author's permission to call his work "Manual of Trade Mark Cases," Cox, instead of Sebastian, American edition. Would it not have been better to have kept in the most prominent place on the back of the cover the author of nineteen-twentieth's of the work?

W. D. L.

THE LAW OF BY-LAWS OF PRIVATE CORPORATIONS. By LOUIS BOISOT, JR. Chicago: The United States Corporation Bureau, 1892.

This book of Mr. BOISOT can truthfully be said to be the only separate work devoted to the subject. LUMLEY ON BY-LAWS is an English work dealing almost exclusively with the by-laws of municipal or quasi-municipal corporations. The author of the book before us confines himself to the subject of the by-laws of private corporations. To those whose practice requires them to draw by-laws for private corporations, and who therefore desire to know the fundamental principles, this work will prove very useful. For Mr. BOISOT has given concisely and accurately the principles of the "nature of by-laws," their "form and enactment," their proper "subject-matter," and their "effect."

The chief merit of the work lies in what the author has refrained from doing, as much as in what he has done. He has confined himself to principles, not attempting, like too many modern legal writers, to incorporate into the text a digest of the conflicting legislative provisions of the different States. The author thus shows that he fully appreciates the fact, that in as far as the law depends on particular statutory provisions, the lawyer wants to go to the Act direct and not to a text-book. From the latter he only desires to acquire principles which he can apply to, and which will aid him in interpreting the statutory law of his State. The whole work shows care and thought throughout, and leads us to hope that the success, which it deserves, will lead the author to undertake other and more important work.

W. D. L.

ABSTRACTS OF RECENT CASES.

[Selected from the current of American and English Decisions.]

BY

HORACE L. CHEVNEY, HENRY N. SMALTZ, JOHN A. MCCARTHY

APPEARANCE—BY UNAUTHORIZED ATTORNEY.—When a defendant is absent from the State, and has no notice of the action, he is not affected by the appearance of an attorney-at-law for him, without his knowledge or authority : *McNamara v. Carr*, Supreme Judicial Court of Maine, LIBBEY, J., February 10, 1892 (24 Atl. Rep., 856, 84 Me., 299).—*A. S.*

ATTACHMENT—PRIORITY TO DEED.—When a deed is lodged with a broker to be delivered when encumbrances on the land are cleared and the consideration paid, subsequent attachments sued out before the recording of the deed are prior thereto, even though the attorney of the claimants had knowledge of the negotiations for the sale of the land : *Stevens v. King*, Supreme Judicial Court of Maine, PETERS, C. J., February 4, 1892 (24 Atl. Rep., 850, 84 Me., 291).—*A. S.*

CARRIERS—ERRONEOUS TICKETS.—The face of a railroad ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company, and where the ticket agent delivers an erroneous ticket to the passenger the latter must submit to the inconvenience of paying his fare or ejection from the train, and must rely upon his remedy in damages against the company for the negligent mistake of the ticket company. Where the passenger before taking passage discovers that an erroneous ticket has been delivered to him he cannot recover damages for the ejection in an action sounding in tort, as by the exercise of due care he might have avoided the injury. If his action sounds in contract he can recover nominal damages only, as it is his duty to use due diligence to reduce the damages from the breach, and the failure to do so prevents recovery for any damage which might be avoided by due diligence : *Poulin v. Canadian Pac. Rwy. Co.*, Circuit Court of Appeals of the United States, Sixth Circuit, October 11, 1892, TAFT, J.—BROWN, J., dissenting—(52 Fed. Rep., 197).—*H. L. C.*

CONFLICT OF LAWS—BILLS OF EXCHANGE.—Where a bill of exchange was drawn in Indiana, and accepted in Michigan, to be discounted in Indiana and to be paid in Michigan, it was *held* : That it was an Indiana contract, the liability on which was to be determined by the law of Indiana : *Farmers' National Bank v. Sutton Manufacturing Co.*, Circuit Court of Appeals of United States, Sixth Circuit, October 11, 1892, TAFT, J. (52 Fed. Rep., 191).—*H. L. C.*

CONSTITUTIONAL LAW—AUSTRALIAN BALLOT LAWS—PARTY DESIGNATIONS ON TICKET.—The ballot laws of California provide that the names of all political parties which have filed certificates of nomination of candidate in accordance with the statutory requirements shall be printed in separate lines at the head of the official ballot, and that an

elector who desires to vote any such party ticket straight may do so by putting a cross opposite the name of such party; but a ballot so marked shall not be counted if marked in any other place, except to indicate a vote on a constitutional amendment or other question. *Held* (1) That such provision was unconstitutional, as resulting in the partial or total disenfranchisement of any elector so voting unless his party had a full State and local ticket; (2) that Section 1197, which provided that only parties polling three per cent. of the entire vote cast at the last general election should have a heading upon the ticket, was unconstitutional because discriminating against a certain class of electors and is therefore lacking in that uniformity required by the Constitution of the State: *Eaton v. Brown et al.*, Election Commissioners, Supreme Court of California, October 15, 1892, BEATTY, C. J. (31 Pacific Rep., 250).—*J. A. McC.*

CONTRACTS IN RESTRAINT OF TRADE.—The defendant entered into an agreement with the plaintiff, as his employer, that he would not accept another situation, or establish himself in any business, within fifteen miles of London, without the written consent of the plaintiff, for a period of three years after leaving the plaintiff's service; but such permission was not to be withheld if it could be proved to the satisfaction of the plaintiff that the situation sought, or the business established, was not for the sale of the same class of goods as those sold by the plaintiff. *Held* (affirming the decision of KKEWICH, J.) on a motion for an injunction to restrain the defendant from breaking the agreement, that the clause providing that the plaintiff's permission was not to be withheld unless the business in which the defendant engaged was in the same class of goods as the plaintiff's, showed that the restrictive clause was intended to apply to all kinds of business whatsoever, and was therefore wider than was necessary for the protection of the plaintiff and void: *Perlo v. Saalfeld.*, High Court of Justice, Chancery Division, Ap. 12, 1892, (2 Ch., 149).—*G. S. P.*

CRIMINAL LAW—SENTENCE—TERM OF IMPRISONMENT TO BE FIXED FOR FAILURE TO PAY FINES.—Where by statutory provision, a sentence imposing a fine and costs must set a period for which the defendant shall be imprisoned in the county jail for default in payment, in reversing the judgment because of the omission to fix the term of imprisonment, a new trial will not be awarded, but the cause will be remanded for a proper sentence: *Roberts v. State*, Supreme Court of Florida, August 15, 1892, RANEY, C. J. (11 Southern Reporter, 536).

ELECTION LAWS—OFFENCES AGAINST—REWARD.—Where a reward is promised by the chairman of a political meeting for the conviction of any one violating the election laws at a certain election, a citizen who procured a verdict of guilty against an offender of such laws becomes entitled to the reward, although the sentence of the prisoner is indefinitely suspended. It cannot be objected that there is want of consideration for the offer, because of the duty of every citizen in preserving the purity of elections, of the arrest and conviction of the offender, and time and money used by the party to obtain the result of that which he is under no obligation to do, are a substantial consideration. Such an offer is not against public policy, for the reason that the offences are afterward

to be committed. The offer is intended to deter persons from committing the crimes, not to induce them to do so: *Wilmoth v. Hensel*, Supreme Court of Pennsylvania, October 3, 1892, PAXSON, C. J. (25 Atlantic Reporter, 86).

GAMING STATUTES.—On a trial for violating a statute prohibiting gambling in a tavern, where the uncontradicted evidence shows that the room in which the gaming occurred was a room of a tavern, it is immaterial whether or not it was a private bedroom: *McCalman v. State* Supreme Court of Alabama, June 23, 1892, COLEMAN, J. (11 So., 408).—*G. S. P.*

GARNISHMENT—CHECK DEPOSITED AS CASH.—When the payee of a check deposits it in bank, and, according to a custom assented to by him, it is credited on his bank book as so much cash, the title to the check vests in the bank, and the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check was given: *National Park Bank v. Levy et al.*, Supreme Court of Rhode Island, TILLINGHAST, J., June 20, 1892 (24 Atl. Rep., 777).—*A. S.*

INTOXICATING LIQUORS—SUBJECTING PREMISES TO PAYMENT OF DAMAGES FROM SALE—LIABILITY OF ESTATE IN REMAINDER.—Where the lessor of the premises against which an action is maintained for damages arising from the unlawful sale of intoxicating liquors by his lessee, has but a life estate, the estate in remainder cannot be held liable for the damages caused by the sale. *Mullen v. Peck*, Supreme Court of Ohio, June 24, 1892, WILLIAMS, J. (31 Northeastern Reporter, 1077).

JUSTICE OF THE PEACE—CONTINUANCE—JURISDICTION.—When, in a case in a justice court, a writ of attachment is made returnable at a certain hour, and neither party appears within one hour of the time fixed, but the plaintiff sends a written request to the justice to continue the case to a later hour, and the justice does so continue it, the justice has jurisdiction to act: *Wagner et al. v. Kellogg et al.*, Supreme Court of Michigan, GRANT, J., July 28, 1892 (52 N. W. Rep., 1017).—*A. S.*

MARITIME LIEN—STEVEDORE'S SERVICES.—A stevedore rendering services to a vessel in a port, other than its home port, has a maritime lien upon the vessel for such services: *The Main*, Circuit Court of Appeals of the United States, Fifth Circuit, June 20, 1892, PARDEE, J. (51 Fed. Rep., 954).—*H. L. C.*

NATIONAL BANKS—INSOLVENCY—SPECIAL DEPOSIT.—A treasurer of a county, in violation of law deposited certain county funds in a bank, which afterwards became insolvent. These moneys were not deposited as a special, as contradistinguished from a general deposit, and the moneys were mingled with the other moneys of the bank, but the officers of the bank knew that the moneys deposited were county funds, and the certificates of deposit were marked "special." It was held that the county was entitled to payment in full in preference to the other creditors of the bank: *San Diego County v. California National Bank*, Circuit Court of the United States, Southern District of California, October 3, 1892, ROSS, J. (52 Fed. Rep., 59).—*H. L. C.*

NEGLIGENCE—PERSONAL LIABILITY OF SELECTMEN OF A TOWN.—

On an action for negligence by a man employed in constructing a sewer against the selectmen of a town by whom he was *directly* hired. In building the sewer the selectmen were performing a ministerial duty, belonging to them by virtue of their office. While the sewer when built belonged to the town, its construction was not the performance of a duty imposed by general laws upon it for general benefit, but a construction authorized by a town for its benefit and that of its inhabitants. The defendants employed the plaintiff. Whether they were acting as public officers or agents or not, did not alter their duty to him. The fact that the town might also be liable did not relieve them, nor can the case be compared to an agent following the directions of his principal as to hiring and setting a person to work without any control or direction himself in relation to the matter, as the defendants had full control over the work: *Breen v. Field*, Supreme Judicial Court of Massachusetts, October 21, 1892, MORTON, J. (31 Northeastern Reporter, 1075).

OBSTRUCTION OF JUSTICE—INTOXICATING WITNESS TO PREVENT HIS ATTENDANCE.—Any willful and corrupt attempt to interfere with and obstruct the administration of justice is an indictable offence at common law; and, therefore, to intentionally and designedly get a witness drunk, for the express purpose of preventing his attendance before the grand jury, or in open court, is a sufficient interference with the administration of justice to constitute an indictable offence: *State v. Holt*, Supreme Judicial Court of Maine, WALTON, J., June 2, 1892 (24 Atl. Rep., 951, 84 Me., 509).—A. S.

RAILROAD TICKET—REFUSAL TO ACCEPT.—A railroad company can be held liable in damages for the refusal of a conductor to accept the return coupon of a ticket, perfect in letters, figures and stamp, but having without the passenger's knowledge lost its blue color by being wet; and the humiliation and shame, suffered by being obliged to pay another fare or suffer ejection, are the subjects of damages: *Chicago, etc., R. R. Co. v. Conley*, Appellate Court of Indiana, October 26, 1892, NEW, J. (32 Northeastern Reporter, 96).

RIPARIAN RIGHTS.—One owning lands along a river does not part with his character as riparian owner so that a grant of land lying next under the water may not issue to him from the State, when he conveys to a railroad company the *right of way* over land partly above and partly below high water: *New York Cent., etc., Rld. Co. v. Aldridge*, Court of Appeals of New York, October 4, 1892, PECKHAM, J. (32 Northeastern Reporter, 50).

WIFE—LIABILITY OF, AS OCCUPIER OF HER REAL PROPERTY.—

Where by statute a wife is given the same property rights as if unmarried, she may be made liable in damages to one injured by a vicious dog kept and harbored on her property by her husband with her consent, and which has been allowed to escape, and the husband should not be joined as party defendant: *Quilty v. Battie*, Court of Appeals of New York, October 4, 1892, MAYNARD, J. (32 Northeastern Reporter, 47).

INDEX.

ACCORD AND SATISFACTION.

Conditional Payment.

Mere acceptance by a creditor of an obligation of a third person, without proof that the parties agreed that such obligation should be received as payment, is only a conditional payment, 499.

ACT OF GOD. See *Carriers of Freight*.

ACTIONS.

Election of.

Where a contract of sale reserves the title to lumber in the vendor until payment of the purchase money, amounting to a mortgage, the vendor may elect to sue for the debt instead of enforcing the mortgage, 565.

The fact that judgment was recovered in a suit against one who received moneys wrongfully paid by a bank, precludes a subsequent action against the bank for the same sum, 806.

Limitation of.

As the Interstate Commerce Act contains no limitation of the time within which actions for the recovery of excessive freights must be brought, the State statutes of limitation must govern. 504.

ADMIRALTY. See *Law of the Flag—Marine Insurance*.

Bottomry Bonds. See *Law of the Flag*.

Charter Party.

Clause in, excepting "restraint of princes or rulers of people," includes detention by quarantine regulations, 625.

Demurrage.

In absence of stipulation, berth must be furnished within reasonable time after arrival of vessel. By usage of the port of New York, twenty-four hours after arrival are allowed, 564.

Effect of Common Law Judgment.

Common law judgment in favor of defendant, the owner of a vessel, will not bar a subsequent suit in admiralty, where the judgment was based upon the plaintiff's contributory negligence, 365.

Joinder of Ship and Owner.

In a suit for damages by collision, the ship and owner cannot be joined in the same libel, 562.

Maritime Bills of Lading. See *Bill of Lading*.

Maritime Lien.

Arising from damages done in collision is prior to lien of wages of the crew of the offending vessel, which accrued before the collision: but is subsequent to wages accruing after that time, 429.

Stevedore rendering services to a vessel in another than its home port, has a maritime lien therefor.

Proceeding in Rem.

Where a local statute gives a cause of action for death by negligence to the personal representative, but no lien against the offending thing, a proceeding *in rem* will not lie, 562.

Sale of Cargo by Master.

The master of a ship forced to a port of distress who sells a damaged cargo for its owners' benefit, without communication with them, but acts on the best advice obtainable and in good faith, is not liable in an action for breach of contract and conversion if his act is justified by the law of the country under whose flag he sails, 188.

Salvage.

Liberal award for services rendered by a pilot boat attending to take off the pilot by whose fault the steamship ran ashore is against public policy, 711.

Seaworthiness.

Includes competent master and crew, and the owners must provide for contingency of master's death by selecting a competent mate, 223.

AGENCY. See *Husband and Wife—Real Estate Brokers.*

Brokers.

Who are mere agents to sell a cargo, are not personally liable for the freight, 219.

Liability of Principal for Agent's Fraud.

The civil liability of a principal for an agent's fraud committed within the course of business and employment is not changed by the principal's ignorance, nor by the fact that the agent committed the fraud for his own interest, 707.

A stipulation in the agreement of a mercantile agency with a bank, waiving responsibility for loss occasioned by any agent's negligence in furnishing information, will not relieve it from liability where an agent furnished false information for the purpose of deceiving the bank, 707.

Dealers.

One who receives orders, forwards them to the manufacturers, receives the sewing machines sent in pursuance thereof, and sends them to the purchaser is not a dealer nor an agent, 805.

Ratification. See Equity.

Acceptance of benefits accruing through the unauthorized act of another operates as a ratification, 143.

ALIENS. See *Immigration Laws—Constitutional Law.*

*Chinese Exclusion Acts, 48.**Importation of.*

Where a stowaway on discovery was enrolled as a member of the vessel's crew, and deserted at a port of the United States, he could not be regarded as an alien under Act of Congress, March 3, 1891, so as to charge the master with the penalties imposed thereby, 316.

ARBITRATION. See *Fire Insurance.*

Appeals from.

Where under by-laws of a corporation the decision of a committee is to be final in all appeals from a board of arbitrators, its decision as to the insufficiency of evidence to substantiate a claim is conclusive, 141.

Revocation of Submission.

Written revocation of authority delivered to arbitrators before their award is signed and published is sufficient, although before the revocation they had *orally* announced their decision respecting certain items of claim, 708.

Sufficiency of Award.

An award must cover all items submitted, and must be certain, mutual and final, 708.

ASSIGNMENT. See *Conflict of Laws*.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Preferences. See *Trusts*.

Validity of preference by absolute sale of property in discharge of creditor's debt, is not affected by a general assignment of the balance of the property, 711.

Where a mortgage is given to secure a debt, and the same day an assignment is made, the mortgage will be treated as part of the assignment, 711.

ATTACHMENT.

Continuance.

Where an attachment is made returnable in a justice court at a certain hour, when neither party appears, the justice has jurisdiction to continue the case when requested by the plaintiff.

Garnishees.

Treasurers of a benevolent association hold the assessments paid as trustees for the association, and are liable to be summoned as garnishees in an attachment suit, 60.

Drawer of a check deposited by the payee, cannot be garnished as debtor of the payee respecting the debt paid by the check.

Priority to Deed.

Attachments sued out before recording of a deed are prior thereto, even though the claimant's attorney had knowledge of the negotiations for the sale of the land.

ATTORNEY AND CLIENT. See *Champerty—Malicious Prosecution*.

Agreements for Compensation.

In England, a client's express promise to pay an advocate's fee cannot be enforced; but an action will lie at the instance of a barrister or attorney, 751.

In the United States, except in New Jersey, where the distinction between attorneys and advocates is recognized, the English rule is held to be not a part of its inherited jurisprudence, 752.

Authority of Attorney.

The petition of a plaintiff to strike off the satisfaction of a judgment from the record, upon the ground of want of authority of his attorney to enter satisfaction, will be granted, 630.

Negligence.

Where defendant's attorney in a foreclosure suit negligently failed to file an answer and the bill was taken *pro confesso*, the only redress was against the attorney; the court would not vacate the judgment on the ground of accident and mistake, 141.

BAILMENT.

Gratuitous.

Gratuitous bailee is not liable for loss where he is not guilty of negligence, 804.

Liability of Storekeeper to Customer.

Depositing a watch for safe keeping in a drawer indicated by the salesman in a clothing store, being a necessary incident of defendant's business, constitutes him a bailee for hire, and as such bound to exercise ordinary diligence, 631.

Sale by Warehouseman.

Of goods for account of consignor, without notice of an adverse claim is no conversion, 222.

BANKS AND BANKING. See *Bills and Notes—Insolvency—Principal and Surety.*

Checks. See Attachment—Discharge of Drawer.

Deposited by the payee, and credited to him as cash, the title thereto vests in the bank.

Where a bank permits depositors to draw against checks deposited before their collection, the title to such checks passes immediately to the bank upon entry made in depositor's pass-book; but not so, when the deposit was made when the bank was irretrievably insolvent, 424.

Cannot defend an action brought to recover amount of forged check paid on a depositor's account, 57.

Bank is liable in damages for refusing to pay check, where there are funds to meet it, even though refusal was by mistake, 57.

Credit for Return of Funds Wrongfully Withdrawn.

Where none of a defaulter's fellow-officers had received notice of deposits to the credit of the bank, with its correspondent in New York, made by defaulter's brokers, of sums which he had wrongfully withdrawn, it was a question for the jury, in a suit against the brokers, who claimed credit for the sums returned, whether the bank officers, in the exercise of reasonable care, could have ascertained that the deposits had been made, and whether they would have accepted them as a return, 562.

Deposits and Depositors.

Bank not liable even to innocent holder for value on certificate of deposit issued before incorporation, and signed as cashier by the person who afterward became such, 498.

Depositor not guilty of laches in not notifying bank of forgery of check where it is shown that such notice would not have enabled it to relieve its loss, 57.

Special Deposit.

Where a banker gave a certificate stating that the deposit was made for a special purpose and, with the depositor's knowledge, used the money in his business, upon his insolvency, it was held that the deposit was general, and no trust created which would give the depositor preference over other creditors, 562.

Where a cashier appropriated a special deposit that he had received on behalf of the bank for gratuitous safe keeping, he acted beyond the scope of his authority, and the bank is not liable where it exercised due diligence in selecting and retaining him, 804.

Where county funds were unlawfully deposited in a national bank, and the deposit was not "special," but the officers knew that they were county funds and that the certificates of deposit were marked "special," upon the bank's insolvency the county was entitled to full payment in preference to other creditors.

Discharge of Drawer of Check.

Drawer of check is discharged from liability thereon if payee or holder gets it certified on his own behalf, instead of collecting it, and the bank becomes insolvent before it is paid, 563.

Drafts for Collection.

Where a bank which had sent a draft for collection to its correspondent, with whom it had no account, but from whom it received remittances of collections every five days, became insolvent before the proceeds of the draft had been remitted, the original owner of the draft could recover the proceeds in the hands of the correspondent bank, 563.

BEHRING SEA. See *International Law*.

BILLS OF LADING.

Collateral Security. See *Stoppage in Transitu*.

Exemption from Liability for Negligence.

In maritime bills, shipowner should be exempt from liability for "accidents of navigation," even when indirectly caused by the negligence of the crew, 637.

Maritime Bills.

Uniformity with those of other countries, recommended, 633.

Provisions in

Criticism of decision in *Jennings v. Grand Trunk R. R.*, that an answer to an inquiry for rates of transportation completes the contract on delivery of goods to the carrier, so that the bill of lading, signed by shipper's agent, is of no effect, 364.

In the absence of stipulation, the consignee is not liable for detention at the port of loading, by the shipper, who alone is liable, although the contract of affreightment with the master was made by the consignee, 564.

Stoppage in Transitu.

The right of the consignor is lost by the assignment of the bill as collateral security, until he has discharged the debt secured, 63.

BILLS AND NOTES. See *Conflict of Laws*.

Acceptance.

Delivery of acceptance of a bill of exchange to authorized agent of payee, is a delivery to the payee, and the contract thereby becomes complete between the acceptor and the principal owner of the bill, 216.

Accommodation Note.

Maker of a note, given to a corporation for money loaned, is estopped from setting up that the loan was *ultra vires*, 366.

Alteration.

Of an endorsed note by payee, when all parties intended it should have been made for the corrected amount, will not relieve the endorser, 222.

As Collateral Security.

Where all the parties agree, a compromise will be sustained whereby a pledgee of negotiable securities as collateral accepts from the parties bound less than the face value in discharge thereof, notwithstanding the general rule to the contrary, 62.

Consideration.

Part payment, not a valuable consideration which would bind promisee to observe express promise to indulge, 63.

Part payment by the maker of an overdue note, is insufficient consideration to support a promise for extension of time, so as to discharge the indorser, 711.

In an action on a note, the fact that it is shown that the note for which it was given was declared to have been made without consideration, does not affect the consideration of the note in suit, 808.

Discharge of Surety.

Surety's original obligation not altered by payment on account by the maker of the note in consideration of extension of time, 63.

Endorsement.

It would seem that the endorsement of a foreign administrator in a foreign country, where he is capable of passing title by endorsement of his decedent's negotiable paper, would confer a complete legal title upon his endorsee, so he can sue in his own name.

Endorsement After Maturity.

Endorsee after maturity takes the note subject only to defences valid against the endorser, 567.

Notice.

The fact that a notice of protest, enclosed by the holder in an envelope bearing directions to "return if not called for," and addressed to the endorser, was never returned, is sufficient to charge the endorser, 711.

Bank discounting a note is not affected with notice of defences known to an officer of the bank, who presented it, where the latter was president of the payee, and acted entirely in that capacity, 367.

Payable After Death.

Order on executors to pay, one year after death, a promissory note, not a testamentary paper, 431.

Reformation of Note.

In an action brought by the holder of a note against the president and secretary of a corporation, who signed it intending to bind the company only, and the plaintiff had no reason to believe otherwise, the defendants were entitled to have the note reformed to express the true contract of the parties, 568.

Set-off.

Endorser of promissory note, held by a national bank and maturing after insolvency thereof, may set off the amount of his deposit at the time of the insolvency, 360.

In a suit by an assignee, to recover amount of deposit, bank may set off amount of note held, upon which insolvent is liable, 365.

CARRIERS OF FREIGHT. See *Railroad Companies.*

Connecting Lines.

In absence of contract between, there is no obligation to transport freight in cars in which it is tendered, unless it will be injured by transfer, and unless the company receiving it has no cars of its own ready for service, 808.

Where a connecting line transports freight in the cars in which it is tendered, the usual mileage for the use of such cars must be paid, 808.

Contract of Carriage.

Notwithstanding a stipulation that shipper has examined and accepted the car as suitable, he is not estopped from setting up a defect in the car by which his stock was injured, 284.

*Discrimination in Rates. See *Interstate Commerce.**

At common law an action will lie for an excessive freight charge, but not for discrimination in rates, 498.

Where the owner of freight, by an agreement with a favored customer of a carrier, procures its transportation in the name of such customer, who afterwards receives the rebate, he cannot recover the amount of the rebate from such customer, as the contract is in violation of public policy and void, 563.

Liability for Loss.

Where a State code imposes the duty of extraordinary diligence upon common carriers, and the immediate agency of loss is an act of God, the presumption still is that the loss is due to negligence, to rebut which, the act of God must be shown to be the *sole* cause of the loss, 805.

Carrier may, by contract, protect itself against liability for loss of goods not occurring on its own line, 563.

Lien for Freight.

Where the wrong rate is given to a shipper by an employee without authority, the company may hold the goods until the correct rate is paid, 365.

Railroad Lease.

Legality of, under Constitution of Pennsylvania, when made to control coal trade, 289.

CHAMPERTY AND MAINTENANCE. See *Attorney and Client.*

Champerty is the unlawful maintenance of suit, in consideration of a part of the thing in suit, 754.

Thus defined is the law of Massachusetts, Indiana, Kentucky, North Carolina, Tennessee, Alabama, New Hampshire and Maine, where the mode of compensation is held to constitute at common law the gist of the offence, 754.

In Delaware, Georgia, Illinois, Iowa, Missouri, Mississippi, West Virginia, Virginia, Wisconsin, Kansas, Ohio and (probably) South Carolina, Maryland, Oregon, Nevada and Rhode Island the gist of the offence is the unlawful meddling in another's suit, whereby justice and truth are suppressed, 755.

And in the above States a contract for the payment of contingent fees is void only where the attorney agrees to pay the costs, 754.

But the attorney may *advance* incidental costs: *contra*, in New York code, 757.

English statutes against champerty were devised to prevent the conveyances of pretended titles by those who were unable to prosecute them; the gist of the offence being the contribution to the costs of the suit, 755.

Except in cases specified in its code, champerty forms no part of the New York common law, 756.

In Michigan, Texas, California, New Jersey, Arkansas, Vermont, Connecticut and Pennsylvania the doctrine of champerty as applied to contracts between attorney and client, forms no part of the law, 756.

The general rule is that though a contract between an attorney and client be void for champerty, yet he may recover on a *quantum meruit*: *contra*, in Alabama, Maine and Kentucky, 757.

Doctrine of champerty is of little utility in the United States as applied to contracts between attorney and client, 757.

Contingent Fees.

Contracts for their payment are rigidly scrutinized by the courts, but when made in good faith are sustained by the Federal courts, and by those of all the States except Tennessee, 753.

In England have been held void under the statutes against maintenance, 753.

For rendering services in claims against the United States Government are valid, 753.

But *contra* as to contracts for lobbying, 753.

Contract providing that no compromise or settlement of the case shall be made without attorney's consent is void; but *contra* in California, 753.

Receiver of a National Bank cannot contract to pay, 753.

An agreement whereby an attorney in consideration of the assignment of a judgment to him agrees to conduct its prosecution and to advance the expenses of the suit, which are to be divided if it fails, and if successful to divide the proceeds, is not champertous, 708, 751.

CHARTER PARTY. See *Admiralty*.

CLUBS. See *Liquor Laws*.

COMMISSIONS. See *Real Estate Brokers*.

CONFLICT OF LAWS. See *Law of the Flag*.

Bill of Exchange.

Drawn in Indiana and accepted in Michigan, to be discounted in Indiana and to be paid in Michigan, is an Indiana contract.

Between States.

Administrator of a person killed in Connecticut by wrongful act of another can sue in Massachusetts, under a Connecticut statute, to recover damages, 217.

Trusts created by will in a State where they were valid, will be upheld in the State in which they are to be maintained, although there invalid, 500.

The validity of a contract made in Kentucky between a limited partnership organized under Pennsylvania law, and a Kentucky corporation, is determined by the law of the State where the contract is made, 424.

Recovery of damages in a suit brought by an employee against his employer in a State other than that in which the contract was made and was to be executed cannot be had where, in the latter State, there could be no right of action, 368.

A parol lease of lands, within the Statute of Frauds of the State where it is made, will not be enforced in an action brought in another State where it is valid, 284.

Contracts of Shipment.

Where the stipulations of the contract are valid according to the law of the destination, and invalid under that of the place of shipment, the presumption favors the former, 635.

Execution of Powers.

Where the execution of a power is in question, the law of the domicile of the donor governs and not that of the donee, 629.

Executors and Administrators.

Each State for the protection of its citizens assumes the exclusive control over the assets of a foreign decedent found within its limits.

But a foreign administrator who has acquired the legal title of the decedent's personal property there situated may maintain suit therefor in another State where it may be found without taking out new letters of administration.

And the power of a foreign administrator to invest his assignee of a note payable to order or to bearer with title so that he can sue in the *situs* of the debt in his own name, thus avoiding an additional grant of administration, is sustained by a majority of decisions.

And the assignee of a foreign administrator may maintain suit in a Texas court for the payment of a note payable to the intestate, and to enforce a trust deed made to secure its payment, in the absence of

any Texas administration and Texas creditors, where the law of the foreign State has not been proved to deny the administrator's right of assignment.

Federal and State Courts.

Federal tribunals should follow decisions of State courts upon questions which are solely within State control, 500, 566.

Where there are conflicting appointments of receivers of a railway company, the question is decided in favor of the court which first acquired jurisdiction by seizure of the property, 427.

Law of the Flag. See Law of the Flag.

Must be followed in case of maritime disaster, when the master becomes the agent *ex necessitate* of the owners to preserve their interests, 636.

Place of Performance and Execution.

The liability of a married woman upon a bond and mortgage given in Pennsylvania to secure the purchase money of land in Delaware, must be determined by the law of Delaware, 625.

State and U. S. Law. See Contracts—Constitutional Law—Legislature.

Between power of State to declare acts done therein criminal, and constitutional provisions, prohibiting impairment of contracts, the Interstate Commerce Clause and the guarantee to the citizens of each State the rights of citizens of every other State, 214.

CONSTITUTIONAL LAW. *See Courts—Criminal Law—Interstate Commerce—Mechanics' Lien—Police Power.*

Death of President and Vice-President, 702.

Bounties.

Granted by Congress to stimulate the sugar industry, are for a public purpose and constitutional, 301.

Due Process of Law. See Municipalities.

Imposition of heavy fine, with alternative of long imprisonment, by a cumulative sentence passed by a petty magistrate, sitting without a jury, upon an offender charged with but one offence, but tried for a number of offences, is a violation of the Fourteenth Amendment, although approved in *O'Neill v. Vermont*, 618, 619, 620.

Where the sentence of an inferior court appearing before the Supreme Court of the United States, has been passed without jurisdiction, the Fourteenth Amendment commands its reversal, 621.

Exercise of absolute power in fixing rates by Interstate Commerce, a deprivation of property without, 165.

Fifth Amendment.

The fifth amendment is violated by compelling a person to testify against himself in a criminal case, although he is not the one prosecuted, 217.

Fourteenth Amendment.

In absence of a State civil rights statute, a rule of a theatre prohibiting colored persons from occupying seats in certain places, is not a violation of the Fourteenth Amendment, 628.

State tax upon railroad companies according to their gross receipts proportioned to number of miles operated within the State, does not conflict with the Fourteenth Amendment, 217.

Constitutionality of such a tax discussed, 203.

Fourth Amendment.

Where the president of an insolvent bank, charged with violating the banking law, prayed that the receiver be compelled to deliver to

him a trunk which he alleged contained private papers, the order of the Court appointing a master to privately examine and distribute to the receiver and complainant the papers properly belonging to each, was unconstitutional, 626.

Gerrymander.

An apportionment act will be declared unconstitutional, if there is a manifest abuse of the limited discretion reposed in the legislature by the State Constitution.

Immigration Laws. See *Aliens.*

Provision of Congress that the decision of Treasury Department as to right of aliens to land shall be final, is constitutional, 224.

Impairment of Contracts.

Prohibition of impairment of contractual obligation merely prohibits legislation after valid contract is made, 213.

Postal Laws.

Act of Congress making it a misdemeanor to send lottery advertisements through the mails, constitutional, 285.

Protection.

Constitutionality of McKinley Bill, 65.

CONTRACTS. See *Conflict of Laws—Corporations—Fire Insurance—Legislature.*

Affreightment. See *Admiralty—Law of the Flag.*

Against Public Policy. See *Carriers of Freight.*

Ante-nuptial Contract. See *Dower.*

Between a medium and a spiritualist, whereby the man conveys property to the woman, but subsequently refuses to marry, or to complete the grant by delivery, cannot be enforced, 518.

By persons contemplating matrimony, respecting their property are favored by the law, and will be sustained in the absence of fraud, or unless the alienation is in fraud of creditors.

A will executed by a woman before marriage, liberally providing for her husband and otherwise disposing of the residue, although revoked by the marriage, was enforced in equity as an ante-nuptial settlement.

Parol ante-nuptial agreement concerning chattels is valid, but there must be clear and convincing proof of its existence.

Of Carriage. See *Carriers of Freight.*

Certainty.

Contract to furnish coal for steamboats for a year, at a stated price per ton, though uncertain, was complete and valid for the entire year, as by its terms the amount was determinable, 141.

Consideration. See *Fraudulent Conveyance.*

Agreement by owner with *bona fide* purchaser of stolen goods that if he would return part he could keep the remainder, is void for want of consideration, 218.

Illegal Agreement.

Where the sale of liquor is prohibited by a State statute, a saloon-keeper cannot recover for damage to the liquor caused by his landlord's failure to supply ice as agreed, 626.

Implied.

Use of system of advertising, suggested by another without agreement of compensation, raises no implied contract to pay therefor, 432.

Joint and Several.

A contract signed by nineteen, stating the various amounts subscribed by each toward the sum agreed upon, is several, consisting of nineteen distinct contracts, 218.

Law Determining Validity. See *Conflict of Laws*.

Obligation of. See *Constitutional Law*.

If by the *lex loci* a contract is criminal, there is no obligation which can be impaired, 213.

Power of State over.

Power of State to prohibit a citizen from making, by his own agent, a contract with a foreign corporation, 209, 213.

Reformation. See *Notes and Bills*.

Restraint of Trade. See *Damages—Equity*.

City ordinance giving the exclusive right of removing dead animals is not invalid as a contract in restraint of trade, 222.

Association formed between stenographers of a county to restrain competition among members and maintain uniform charges, illegal, 285.

A clause in a contract providing that plaintiff's consent to engage in any business within given limits for a given time should not be withheld, unless it should be for dealing in the same class of goods as the plaintiff, is void, as being wider than necessary for the plaintiff's protection.

Of Sale.

Made in violation of a valid ordinance, as it is an act done in disobedience of the law, creates no right of action which a court of justice will enforce, 566.

Of Shipment.

Are presumably under the law of the place where made, in absence of a contrary intention of the parties, 634.

Of Subscriptions. See *Corporations*.

Sunday Contracts.

An assignment of personalty, executed on Sunday by an old single woman, sick in a hospital, in trust for her life, with remainder to assignee, not invalid under Massachusetts statute, 501.

COPYRIGHT.

Dramatic Composition.

Stage dance not within meaning of the Copyright Act, 709.

CORPORATIONS. See *Arbitration — Courts — Municipalities — Real Estate Brokers*.

Action by Stockholder.

A stockholder can bring suit in his own name to enforce a right of the corporation without first requesting the directors to sue, where a majority of the board are hostile to complainant, and would oppose the commencement of such litigation, 142.

Assets not a Trust Fund.

Assets are trust fund for payment of creditors only in that creditors are entitled to payment before any distribution among stockholders, 219.

By-laws. See *Arbitration*.

Corporate Name.

Use of a word in title cannot be restrained where it was used by a company prior to plaintiff's organization, 709.

Officers.

Where a State law provides that at least three of the directors elected must be residents, three residents will be elected over non-residents, although the latter received a majority, 427.

Director is not bound to disclose to a stockholder, before purchasing his stock, what facts he may know affecting its value, 218.

Right to Examine Public Records.. See Injunction.

A title and guarantee company is entitled to the same right of access to and examination of the public records of the county as an individual, 769.

Stock.

Upon bankruptcy, a stockholder is liable for only so much of his unpaid subscription as may be necessary, with the other assets to satisfy creditors, 427.

Such payment can be enforced only when the amount to be paid has been approximately ascertained, 427.

Where stockholder is judgment creditor of the insolvent corporation he cannot be compelled to set-off his unpaid subscription against his judgment, 427.

A corporation which is custodian of its stock held in trust, with knowledge of the trustee's power to sell, is not guilty of negligence in permitting a transfer on request of trustee's attorney, although it was to secure the attorney's individual debt, 428.

Holders of "bonus" stock can be charged by creditors subsequent to such issue only on the ground of participation in a fraud making the corporation to misrepresent its financial standing, and such creditors, if assignees, must show that they paid full value for their claims, 218.

Where corporation was organized before the amount agreed had been subscribed, the fact was no defence to an action for balance of subscription, where subscriber had recognized the validity of the corporation by paying the first two calls, 501.

Ultra vires. See BILLS AND NOTES.

An agreement by which all or a majority of the stockholders enter into a "trust" combination by which a monopoly is created, is *ultra vires* of the corporation, 426.

*COURTS. See Removal of Causes — Stare Decisis — United States Courts.**Appeal.*

Advisability of allowing appeals in a question of fact; as negligence, 407.

Appearance.

Entered by an attorney-at-law without authority, on behalf of the defendant, does not affect the latter when he is absent from the State and without notice of the action.

New Trial.

Granted where newspapers, influential at the place of the trial, made statements during its progress which were likely to prevent an impartial verdict, 287.

Quo Warranto.

A State court may by a proceeding in *quo warranto* oust a foreign corporation from exercising its franchises and privileges in violation of State law, 628.

Summons.

Non-resident suitor who is personally interested in the result of the suit, though he may also testify in the trial as a witness, is not exempt from service of summons in another suit, 64.

Writ of Error.

A proceeding in error and not *habeas corpus* is appropriate to secure reviews and correction of errors committed by courts acting within their authority, 59.

Writ of Prohibition.

Is not granted *ex debito justitiæ*, but rests in the sound discretion of the Court, 568.

Will issue to prevent enforcement of an ordinance which is oppressive and unreasonable, although the only inquiries permitted upon prohibition are whether the inferior court is exercising a jurisdiction it does not possess, or having jurisdiction has exceeded its powers, 568.

CRIMINAL LAW. See *Evidence* — *Extradition* — *Habeas Corpus* — *Treason*.

Procedure in early criminal trials, 371.

Punishment of crimes in English jurisprudence, 458.

Accomplice.

The person upon whom an abortion is sought to be performed is not an accomplice, 216.

Cruel and Unusual Punishment.

Cumulative sentence upon conviction under an indictment for several offences, as a "cruel and unusual" punishment within the meaning of the Constitution, 619.

Embezzlement.

Employee who takes money after having placed it in drawer of cash register, but without registering sale, commits embezzlement, not larceny, 429.

*Equity Jurisdiction Applied to.**Indictment.*

An information containing a photograph of a Chinese lottery ticket, untranslated, violates the provision of a penal code that the language used must be of common understanding, 220.

Gaming.

Where gaming in a tavern is prohibited by statute, it is immaterial whether or not it was in a private bedroom of the tavern.

Illegal Voting.

Is a misdemeanor at the common law.

Juror.

A juror who states upon his *voir dire* that he has formed an opinion as to the guilt or innocence of the accused which will require evidence to remove is incompetent, 628.

Offences Indictable at Common Law.

In States where a penal code has been adopted, there can be no common law offences.

All offences against government, public justice, public morals or the public peace, are indictable as common law offences in the absence of statutory law or precedent.

Preventing Attendance of Witness.

Intoxicating witness in order to prevent his attendance, is an obstruction of justice, and an indictable offence at the common law.

Remarks of Counsel.

Comments in the course of argument by the prosecuting attorney upon the failure of defendant's counsel to answer a challenge to explain the evidence "upon any other reasonable hypothesis than that of guilt," is not ground for objection, 568.

Reward.

One who procures the conviction of an offender against the election laws, is entitled to a reward offered for such conviction, although sentence upon the prisoner is indefinitely suspended.

Sentence.

Where a sentence imposing fine and costs does not conform to a statute requiring such sentences to fix a term of imprisonment for default in payment, the judgment will be reversed and the cause remanded for a new trial.

Solicitations to Commit Crime.

Are a species of attempt, being overt acts evidencing a criminal intent, and are independently indictable.

Are indictable, whether they be solicitations for the commission of felonies or merely of misdemeanors.

CY PRES DOCTRINE. See *Trusts*.

DAMAGES. See *Eminent Domain—Roads and Streets—Telegraph Companies*.

Consequential.

May be recovered where lands are depreciated in value by reason of the construction of a railroad in proximity thereto, although no land is taken, nor the rights and easements of the owner disturbed, 63.

Evidence.

The owner of coal lands, through which a gas company has run pipes under its power of eminent domain, may prove their general depreciation in market value by showing the character of the soil, the depth of the line, and its general interference with successful mining, 219.

Land.

Damages can be recovered for injuries to crops from fumes of coke ovens, 27, 32.

Coke burning, being a private industry, will, notwithstanding its importance, be denied the immunities enjoyed by railroads and other public servants, 27, 32, 33.

Extent of application of the maxim, *sic utere tuo ut alienum non laedas*, 38, 39.

Acts done in the natural use of land which damage a neighbor's property, are protected only when the damage results from the operation of natural forces upon the injurious substance, 40, 41.

In *Pennsylvania*, however, such acts are protected only when they are shown to be necessary to their use.

Measure.

Damages to the fee of property abutting on line of elevated railroad must be measured by the injury to easements of light, air and access, 428.

Noise of road, interference with privacy, and interception by the structure of the view of the premises, may be considered in estimating damages to rental value, 428.

For breach of contract not to sell within a certain district, is the defendant's profits, 285.

Mental Suffering.

Mental suffering caused by carrier's negligence in failing to carry promptly her husband's corpse, is ground for damages, 57.

Right to.

For injuries suffered to land between death of lessor and termination of lease, passes with the title to heirs or devisees, 144.

DECEDENT'S ESTATES. See *Executors and Administrators*.

DECEIT. See *Deeds—Real Estate Brokers—Wills*.

False Representations.

Fraudulent representation, to be the ground of successful resistance of the foreclosure of a purchase money mortgage of a mine, must have been the proximate inducement to the purchase, 629.

Recision of Contract of Sale.

Suit for recision on ground of fraud on part of purchaser cannot be maintained without a return or tender of the purchase money paid, although the vendor has expended it, and cannot raise the amount necessary for the tender, 568.

Spiritualistic Mediums. See *Deeds*.

Conveyance to a third party obtained by intervention of spiritualistic medium is void, even though the grantee is innocent of any share in the transaction, 519.

The *consensus* of opinion seems to be, passing the question of undue influence, that all conveyances and gifts procured by spiritualistic manifestation are *per se* fraudulent and void, 520.

DEEDS. See *Attachment*.

Restrictions in.

Clause in contemporaneous deeds granting contiguous lots, which restricted their use to "first class dwellings," is enforceable by each owner against all the others, 219.

Undue Influence.

Conveyance to a spiritual adviser for an inadequate consideration is invalid, unless the grantee can prove affirmatively the absence of undue influence, 507, 509.

Gifts by nuns to their convents are within the rule; but a petition, by a nun for the transfer of funds to trustees to whom she has assigned her property for the benefit of the convent, cannot be refused merely because the assignment may have been procured by undue influence, 507.

Conveyances to spiritualistic mediums are viewed by the law the same as those to spiritual advisers, 510.

But where there is no evidence that the grantor's peculiar belief influenced the gift, the fact that he is a spiritualist is not sufficient evidence of mental incapacity to set it aside, 521.

Where complainant thought that the paper shown him by defendant, his confessor, was the revocation of a will made in his favor; and was induced by the defendant to execute a trust deed of the property in favor of the church of which defendant was pastor, equity set the transaction aside not only because of fraud, but also because of the relations of the parties, 564.

DIVORCE.

Alimony.

Where defendant admitted the allegation that she was already married at the time of the second marriage, her application for alimony and counsel fees *pendente lite* was denied, 142.

DONATIO CAUSA MORTIS.

Growth and nature of the doctrine, 681.

Delivery of Means of "Getting at" the Chattel.

In general, such delivery is sufficient to support a gift of the fund, 685.

Delivery of a key is sufficient if the box or trunk is beyond the control or custody of the donor, 662, 674, 685, 686.

Delivery of negotiable instruments, or shares of stock, in general, passes title to the fund they represent, 685, 686.

But the check, promissory note, or bill of exchange to pass by mere delivery, must be that of a third party, 686.

If it is the donor's own note, etc., delivery is not sufficient to give donee valid title; but an endorsee of the donee may enforce it against the donor's personal representatives, 686.

Delivery of a receipt endorsed with instructions to pay the amount to the donee, is sufficient, 806.

Delivery of Bank Book.

Delivery of savings bank book, except in Maryland and Pennsylvania, sufficient to pass title, although the bank may require a power of attorney from the depositor, 689.

Delivery of ordinary pass bank book, ineffectual to pass title to the fund, 672, 678, 689.

Quære: Why should not delivery of a pass bank book pass title to the fund? 679-690.

Gifts of all a Man's Estate.

The magnitude of the gift may raise a question for a jury whether or not a nuncupative will was intended, 681, 682.

The mere fact that the whole estate happens to consist of personal property should not militate against the donee's right, 662, 676, 682.

Revocation of Gift.

Is effected by donor's recovery from the illness that threatened him when the gift was made, although he subsequently dies, 684.

But a change in donor's belief as to the chances of his recovery, will not affect the gift, 684.

Tests of Validity.

Must be made in apprehension of some immediate peril of death which either exists at the time, or the donor imagines to exist and may result in his death, 683, 684.

Must be an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, 683.

DOWER.

History of, among different nations, and development of, in English law.

At common law the right, having attached, adhered to land, sold or devised by the husband unless the wife released her right.

But in England, since 1834, the right does not exist in lands so disposed of, although she did not join in the deed, so that dower may be had only of these lands of which the husband died seized.

New Hampshire, Vermont, Connecticut, Delaware, Tennessee, Florida and Georgia, by statute following the English rule.

In Maine, New Hampshire and Massachusetts, dower may not be had in wild land, not if the husband's alliance improve it before the husband's death; *contra* in Pennsylvania.

Creditors have precedence in the United States over the widow's right; *contra* by common law of England and in Tennessee and by North Carolina and Indiana statutes, the English rule is followed.

Common law dower never existed, or has been abolished, in Arizona, Colorado, California, Dakota, Idaho, Indiana, Iowa, Kansas, Louisiana, Minnesota, Nevada, Texas, Utah, Washington and Wyoming; and has been modified in Connecticut, Alabama, Arkansas, Missouri and Ohio, 836.

Ante-nuptial Release. See Contracts.

Irrespective of jointure by the Statute of Uses, at the common law dower could not be barred by an ante-nuptial release, nor was a release, if given, binding 838.

In *equity*, any reasonable provision secured by jointure or ante-nuptial release, which an adult accepts, uninduced by fraud or imposition, in lieu of dower, is sustainable, 838, 848, 849.

Ante-nuptial release of dower applies to after acquired realty, unless expressly excepted, 839.

The agreement for release must be in writing, 850.

To bar dower, the woman's consent must be expressly given before marriage, when she is *sui juris* and thoroughly acquainted with her rights and the nature of her action, 840, 845.

The utmost good faith must exist between the parties, and all circumstances bearing on the agreement should be disclosed, but the neglect of a woman to avail of opportunities for gaining information, will not prevent her from securing her dower, where the contract was unfair, 838, 840, 841.

The inadequacy of the consideration raises the presumption of fraud, in the absence of evidence to the contrary, 841.

Where the value of the estate was disclosed to the woman, who released her dower in consideration of one dollar, support and Christian burial, the circumstances indicated the absence of fraud, 842.

Reasonableness of the provision must be estimated rather by the ante-nuptial circumstances of the woman, than by the value of the man's estate, 850.

Where the woman is destitute, and in cases where the marriage is the real consideration for the release; where the man has children by a former marriage entitled to his estate; or where both the parties are old, and the release was made with full knowledge of its effect, it will be sustained, 842, 843, 844, 847, 848.

But as the contract will be enforced according to the real intentions of the parties, the courts are disposed to permit inconsistent declarations of the husband to enlarge the widow's portion, even where she knowingly and unconstrainedly released her dower before marriage, 832, 850.

Where release is deliberately made, with full knowledge of its effect, two witnesses, or the equivalent, are necessary to establish fraud in the execution of the contract, 844.

Where good faith existed in making the agreement, the return of the wife after estrangement, because of dissatisfaction therewith, is not a sufficient consideration for its revocation, 844.

Nor is the abandonment of proceedings instituted for the revocation of the agreement sufficient consideration for its revocation, 844.

Divestment of by Partition.

Dower in lands held by a husband in common with others is divested by a suit in partition to which he is a party, though the wife is not joined, 709, 836.

Extinguishment of Dower.

In Pennsylvania, may be had, by sale upon judicial process against the husband, before or after his death; by sale under *lev. fa. sur* mortgage in which the wife did not join; by sale under testamentary

power for payment of debts, or by authority of the Orphans Court; or by deed with separate acknowledgment by the wife; but *not* by a voluntary assignment for the payment of debts, 834.

Dower is defeated by determination of the estate or avoidance of the husband's title, 837.

An agreement to convey before dower attaches is enforceable in equity to the extinction of dower, 837.

By divorce *a vinculo matrimonii*, adulterous elopement; treason, alienage, fine and common recovery and jointure, 837.

In Equitable Estates.

Common law required *legal* estate of inheritance in husband, but the rule has been abolished both in England and the United States; *contra* in Connecticut, 834, 835.

In Mortgage Lands.

Common law have dower in lands mortgaged after marriage by a conveyance in which the wife did not join; if not otherwise barred; *contra* in States permitting dower only of lands whereof the husband died seized, 835.

DUE PROCESS OF LAW. See *Constitutional Law*.

RASEMENT. See *Land*.

EJECTMENT. See *Mortgages*.

ELECTIONS.

Death of Candidate.

On election day, during progress of election, will not operate to secure the election of the other candidate, unless the latter receives a majority of the votes cast, 58.

Electoral College.

Determination of the number of electors from each State—by the Congress in existence at the time of the election, or by the Congress elected on the day of the election, 700.

EMBLEMENTS. See *Land—Execution*.

EMINENT DOMAIN.

Change in Plan After Assessment of Damages.

Where the change inflicts new damages not embraced in the former assessment, the owner is entitled to additional compensation, 526, 536.

When the original assessment does not restrict the plan, no damages can be recovered for a change; but a change of grade of a proposed railway from a surface to an elevated road, is such a change as would not be embraced in the original assessment, 526, 529, 537.

Damages to Property not Taken.

Recovery permitted only by changes in State constitutions; and, in England, by construction of the Land Clauses Consolidation Act of 1845, 538, 539.

In order to permit recovery, a physical injury must result to claimant's property, 526, 532.

What is a physical injury? 539.

Exercise of Power by U. S.

An Act of Congress providing that lands acquired for harbor improvements shall be vested in the U. S. "without charge to the latter," does not authorize a taking under the power, 284.

Measure of Damages.

To property not taken, determined by comparing its value before and after the work is done, 526, 533, 537.

Subjacent Support to Land.

Where land is taken for erection of a pipe line, the right of subjacent support is included in the servitude fastened upon the land, 219.

EQUITY. See *Courts—Injunction.*

Cy-pres Doctrine. See *Trusts.*

Injunction. See *Master and Servant.*

Will issue to restrain acts which are merely unlawful, but which may lead to criminal acts, 710.

Will not issue to suppress valuable industry, such as coke burning, although fumes impair the complainant's crops, 27, 31.

Proper remedy to prevent breach of contract not to sell within a certain district, 285.

Laches

Where the grantor of a voluntary trust deed was advised, shortly after its execution, that it was unimpeachable, and upon a contrary opinion given more than twelve years after, promptly brought action, her laches and acquiescence were thereby negatived, 709.

Ratification.

Equity will compel the burdens incident to the benefits received through another's unauthorized act, to be borne, 143.

Statute of Limitations.

Where there is a legal and an equitable remedy in respect to the same subject matter, the latter is controlled by the same statutory bar as the former, 62.

Slay of Execution.

An offer by the defendants in a suit at law, to pay the sum that is due, is an equitable ground for staying the suit, or, if the offer is made after judgment in plaintiff's favor, for staying execution, 58.

Where a motion to annul satisfaction of a judgment has been sustained, execution will be enjoined, where the judgment vacating the entry was obtained by artifice, 630.

ESTOPPEL. See *Roads and Streets.*

EVIDENCE. See *Extradition—Interstate Commerce—Wills.*

Conduct.

Instructions to the jury that they may consider defendant's demeanor and conduct during a murder trial, in determining his credibility as a witness in his own behalf, are erroneous, 286.

Confessions.

A confession made to the sheriff, whom accused sent for, and who said, "If you are going to tell the truth I want to hear it; and if not I don't want to hear it," is voluntary and admissible, 627.

Made to a private detective, who made the arrest, and who promised that he would "make it easier" for the defendant if he would confess, is voluntary and admissible, 774.

Admissibility of confessions as evidence, generally, 776.

Expert Testimony.

Neither the conductor nor the engineer of the train which injured the plaintiff, are competent experts as to whether the train was running at a dangerous speed when the accident occurred, 627.

Physician not an expert as to matters of common knowledge or observation, 429.

Judicial Notice.

Courts take judicial notice of the population of cities and towns according to the authorized census reports; and of the local divisions of a county or state, 858.

Opinion.

Statements of the engineer to an injured brakeman, two minutes after the accident occurred, that it would not have happened, if the engine had been repaired the night before, not admissible, 565.

Physical Examination.

The Court by its power of discovery conferred by statute cannot compel, at the instance of the defendant, the plaintiff in an action for personal injuries, to submit to a physical examination in advance of the trial, 142.

Privileged Communications.

Production, by wife's administrator, of letters between husband and wife, where both are dead, not prohibited by a law merely affecting the competency of a husband or wife as a witness against the other, 502.

A criminatory letter given unsealed by the accused to his daughter for his wife, is privileged in the hands of either, but not in the hands of another daughter, who secured it before delivery, 286.

Doctrine does not apply to a solicitor of patents who is not an attorney-at-law, 286.

Res Gestæ.

In a trial for murder, statement, made an hour afterward, by the deceased to a physician, that defendant had done it with a knife, inadmissible, 502.

Statements made by an injured brakeman immediately after the accident, as to matters other than those which occurred prior to the accident, are admissible, 565.

In a trial for murder, evidence that immediately after the killing, the accused started off, and a bystander said, "Call the police," whereupon he snapped his rifle at her, was properly admitted, 219.

Unfriendly Witness.

Where it appears merely that a witness is not friendly, and not that he was actuated by ill will, the testimony may be disregarded only where it is knowingly and wilfully untrue as to a material fact, 502.

EXECUTION. See *Judicial Sale.*

Levy on Growing Crops.

May be made at any time after planting or sowing, 606.

It is sufficient, for the officer to enter and announce that he levies upon the crops, 607.

In States where growing crops may be seized, the lien of execution binds them from the delivery of the writ to the sheriff, 607.

Where the right of levy is limited by statute, the right of lien does not attach until the levy is allowable, 607.

After the levy made, the property is in *custodia legis* and is not liable for distress for rent, 607.

Levy upon *fructus naturales* is absolutely void, 607.

Execution creditor may wait until the crop is absolutely ripe, before selling it, and the death of the defendant before that time will not affect the validity of the levy and sale, 608.

The proper practice is to wait until the crop is ripe, but the plaintiff may elect otherwise, 608;

For the sale to be valid, the officer need not go inside the field, but must be within a distance convenient for the bidders to view the crop; and a sale at the distance of two miles is void, 608.

Crops raised by a tenant by curtesy on lands of the wife are liable only for his debts; but those on land held by husband and wife by entireties are held by them in the same manner as the land, 608.

The lessee of land is the sole owner of crops raised thereon, as against the lessor; but where land is let on shares, the ownership of the crops is a pure question of intention, to be determined by the terms of the letting, 609.

In some States, certain crops have been exempted, and in others the common law right of levy has been limited by statute, but the best course is that of Kentucky, where the levy is permitted, but sale forbidden until the crop is ripe, 610.

EXECUTORS AND ADMINISTRATORS. See *Conflict of Laws*.

Ancillary Administration.

Indorsee of foreign executor may recover without additional administration if there are no domestic creditors and the State of decedent's domicil does not prohibit such transfer, 222, 882, 884, 885, 886, 891.

Employment of Agent.

Executors having testamentary authority to sell real estate may employ an agent, and the estate is liable for his commissions, 761.

Title.

Derived from a grant of administration does not extend beyond the territory of the government that grants it, 881.

EXTRADITION.

Between States.

The rule in foreign extradition cases, that the accused can be tried only for the crime specified in the warrant, applies in like cases between the States, 59.

Privilege of Accused.

Accused may assert before the trial his privilege of objecting thereto on the ground that he is indicted for a crime other than that for which he was extradited, although he did not so plead in abatement of the indictment, and plead not guilty, 59.

Warrant as Evidence.

Issuance is *prima-facie* evidence only that the person demanded is a fugitive from justice, 429.

FRAUD. See *Agency, Deceit, Real Estate Brokers*.

FRAUDULENT CONVEYANCE.

Conveyance of Patent.

Insolvent patentee cannot sell patent to a company and have stock issued in his wife's name when she paid nothing therefor, 61.

Conveyance by Insolvent.

Conveyance of land to a son by a father who believes himself to be solvent, but is really insolvent, will not be set aside as a fraud on creditors, 58.

Conveyance to Accommodation Endorser.

Conveyance of land the day before his assignment, by the maker to the accommodation endorser of a note in consideration of the

latter's agreement to pay the note and a mortgage, will not be set aside when the obligations assumed represented the value of the land, 502.

Notice of Fraud.

When an agent for the purchase of realty has notice, before paying purchase money, of the fraudulent character of the conveyance to his principal, it will be set aside on application of the grantor's creditors, though the grantee had no personal knowledge of the fraud, 58.

FIRE INSURANCE.

Arbitration.

Provision as to arbitration, in a policy transferred to and accepted by a mortgagee, binds the latter, but result of an arbitration between insurer and insured does not, 286.

Compliance with a provision for the selection of appraisers and an award in case of dispute as to amount of loss is a condition precedent to the maintenance of an action by the assured; and a failure to allege such compliance in the complaint is fatal to the plaintiff's case, 629.

The non-compliance of the assured with the provision in the policy that losses shall be submitted to arbitration before suit brought, is no defence where the company denied all liability when the adjustment was sought, 806.

Conditions of Policy.

Use of open lights in repairing a mill does not vitiate a policy forbidding them where repairs are permitted which cannot be made without their use, 220.

Construction of Policy.

Written slip attached to a policy privileging the use of the premises for "hazardous or extra-hazardous purposes" negatives a printed clause prohibiting the use of benzine or other explosives, 627.

Limitation of Right of Action.

Where the right of action is limited to one year from the date of the fire, and the company is permitted sixty days after proof, etc., to pay the loss, the limitation does not begin to run until the expiration of the sixty days, 807.

State Regulation of.

Statute making it a misdemeanor for any person, agent or corporation to pay or receive any premium without a license under State law, applies only to the insurer, not the insured, 215.

State Statutes.

Pennsylvania, 1873, 1887, 215.

Transfer of Policy.

Policy not rendered void by transfer of interest of one partner to another partner without company's consent, 503.

FIREWORKS. See *Negligence.*

FISHERIES. See *Police Power.*

FORCIBLE ENTRY.

Detainer by Servants.

Owner of property is entitled to enter forcibly, when he is forcibly detained by his servants, notwithstanding the statutes forbidding forcible entry as a breach of peace, 558.

But where a prompt and efficient remedy for such forcible detainer is afforded by the law, the legality of a forcible entry is questionable, 556, 691.

HABEAS CORPUS

Is the appropriate remedy to obtain discharge from imprisonment under an order or process which is *ultra vires* of the court, 59.

HUSBAND AND WIFE. See *Divorce, Married Women, Slander.*

Action for Death of Husband.

Where a Colorado statute gave the right to sue to the heir or heirs of the deceased upon the failure of the husband or wife to sue within one year after the death; and a wife suffered a non-suit in an action brought within the year, she was not barred from bringing another action two weeks after the non-suit, though nineteen months after the husband's death, 624.

Action for Wife's Services.

Husband's common law right to recover not abrogated by New York statutes, 503.

Husband's Agency for Wife.

Where the husband is the general agent for the wife to sell her property, an agent employed by him for that purpose is duly authorized, 766.

Vicious Dog of Husband.

Where by statute a wife is given same property rights as a *feme sole*, she is liable for injuries caused by a vicious dog kept on her property by her husband with her consent and allowed to escape, 904.

Wife's Agency for Husband.

Ordinary authority of wife for her husband is not sufficient to give authority to an agent to sell husband's lands, 760.

Wife's Right of Action.

If Indiana, wife can sue alone for enticement of husband, 220.

Statutes.

Affecting wife's right of action have been passed in Indiana, 220.

INJUNCTION.

To Restrain Crimes.

Will issue to restrain members of a labor union from threatening or molesting employees of a mining company or entering its works, 782.

Will issue to restrain criminal acts which injure property, 796.

To Restrain Libel.

Generally, equity will not restrain a libel, 784, 787.

Exceptions to the rule: (a) Publication of matter tending to prejudice the public mind against suitors in the court. (b) Publication of letters containing a libel, not belonging to him who published them. (c) Where one does anything that would lead buyers to suppose that his goods are the goods of another. (d) Where one uses another's name so as to render that other liable to lose his property. (e) Where one threatens another man's employees or customers, 782, 787, 788, 789, 790.

Although the general rule is that equity will not restrain a libel, yet it should be waived where an act injures property, although it is also a libel, 791, 796.

Public Records. See *Mandamus.*

Injunction is the proper remedy to prevent the custodian of records

from interfering with a corporation in the exercise of its right of access to them, which is clearly established, 769.

And is the remedy properly applicable to cases where the right of examination claimed is not for a single instance, but for a continuous period of time, 771, 773, 774.

INSOLVENCY. See *Banks, Bills and Notes.*

Equitable Set-off.

A bank holding the notes of an insolvent depositor may set-off their amount against his deposit, although they have not matured at the time of his assignment for the benefit of creditors, as insolvency alone is sufficient ground for the application of the doctrine of equitable set-off, 469.

The doctrine of equitable set-off is applied:

(1) Where at the time of insolvency both the debt due to the insolvent, and that due from him have matured, 484.

(a) But a depositor in an insolvent savings bank may not set-off the amount of his deposit against his indebtedness to the bank, 485.

(2) Where the debt from the insolvent is due at the time of insolvency, but the debt to him matures subsequently, 485.

(a) But a deposit in an insolvent national bank may not be set-off against a debt due to bank which matures after its insolvency: *Armstrong v. Scott*, 36 Fed. Rep., 63, 485.

Contra, *Yardley v. Clothier*, 49 Fed. Rep., 337, approved, 486.

(3) The right to set-off the debt of an insolvent which matures subsequent to insolvency, against a debt due him at that time, on the ground that insolvency alone is a basis sufficient for the application of the doctrine, is involved in doubt; but the affirmative seems preferable, 488.

INTERSTATE COMMERCE. See *Actions—Constitutional Law.*

Bridges.

In absence of Federal Legislation a State may erect within its limits a bridge over a navigable stream which extends beyond the boundaries of the State, 501.

Where a State entered into a contract with the owners of a bridge over a navigable stream which was the boundary of two States, by which it was permitted to tax the bridge as realty, such a tax was not a regulation of commerce, 57, 58.

Discrimination in Rates.

"Party rate" tickets issued by a railroad for transportation of ten or more persons between points in different States at a lower rate than individual trip tickets, not a violation of the Act, February 4, 1887, prohibiting unjust discrimination, 566.

A proceeding to restrain a railroad company from discriminating in rates of freight is not defective, because it does not join as a defendant a connecting carrier participating with defendant in the carriage between certain points, 712.

Competition no justification for discrimination, 712.

Constitutionality of condemnation of rates as unreasonable, which the charters of carriers permit them to charge, 163.

Would the exercise of an absolute power to fix rates involve a deprivation of property "without due process of law?" 165.

The section of the Act, prohibiting, does not compel any railroad to receive freight from a connecting line and transport the same in the cars in which it is tendered, and to pay the usual mileage on such cars, 808.

Nor is a railroad receiving freight from a connecting line compelled to advance or assume the payment of charges due thereon from the point of origin to the connecting line, 808.

Drummer's Tax.

Tax of two and one-half per cent. on gross commissions of brokers who, having obtained a license to do a general merchandise business, negotiate sales for non-resident firms exclusively, not a regulation of commerce, 425.

Result of the decision, 496.

Insurance.

An agency of a foreign corporation to deliver policies is not commerce in the sense that the business cannot be taxed by State, 214.

Interstate Commerce Commission.

The Anthracite trade situation, 154.

Findings of fact as evidence in the Circuit Courts, 137, 156.

Constitutionality of Act, February 4, 1887, 161.

License Tax.

State Statute imposing on a certain trade a license tax on total purchases in and out of the State, not a regulation of interstate commerce, 285.

Upon grocers and druggists on gross purchases made by them of certain articles, whether within or without the State, constitutional, 406.

A fixed license tax upon all sewing machine companies doing business within the State, is constitutional as applied to companies whose plants were in other State, 805.

Liquors.

It is not a regulation or interference with interstate commerce for a State under its liquor laws to arrest and prosecute a citizen of a foreign State for sending to its citizens original packages of liquor marked "C. O. D.;" the contract of sale not being executed until the arrival of the goods at their destination, 612, 614, 619.

Logging.

Maryland Statute, prohibiting claimants of logs blown upon the shores of Chesapeake Bay from removing them without payment of a fee for each log to the owner of the shore, not a regulation of interstate commerce, although the logs may have come from beyond the State, 626.

Natural Gas.

Indiana Statute, forbidding transportation of gas at a greater pressure than 300 pounds, not a regulation of commerce, although an Indiana company had commenced to build a plant suitable for pressure of 420 pounds, necessary to force gas to points in Illinois, 425.

Oleomargarine.

State prohibition of manufacture and sale, apply to sales within the State of foreign manufactured oleomargarine, is not a regulation of commerce, 426.

Original Package.

Sale of two pound package from ten pound tub of oleomargarine, not protected as a sale in original package, 426.

Where bottles of liquor were delivered for transportation to a carrier who, without the consignor's knowledge, placed them in boxes in which they were received, the bottles and not the boxes were original packages, 710.

Oysters.

Act of State legislature prohibiting shipment from the State of oysters in shell taken from State waters, not unconstitutional, 424.

Penalty for Delayed Shipment.

Imposition of penalty without the shipper's consent, for neglect to forward freight for more than five days after delivery for shipment, not unconstitutional, 426.

Railroads.

State may tax railroad property as property, though used in interstate business, provided it is within the State, 206, 207.

Tax on a railroad for its franchise, based on gross profits, and the proportion of its lines within the State to its whole number of lines, not unconstitutional, 217.

Tax on capital stock, based on the number of cars within the State, is constitutional. although the cars are engaged in interstate commerce, 207.

Tax on gross receipts derived from transportation between two points in a State is valid, although the route was by way of points in another State, the transportation being continuous, 500.

IMMIGRATION LAWS. See *Constitutional Law*.*Construction of.*

The Treasury Department having final decision on the right of aliens to land, the Circuit Court, on a writ of *habeas corpus*, can determine only whether a final decision has been rendered, 224.

INSURANCE. See *Fire Insurance—Life Insurance—Marine Insurance*.**INTERNATIONAL LAW.** See *Conflict of Laws—Law of the Flag*.

Jurisdiction of nations over straits, sounds and bays, 590.

Rights of England and the United States in Behring Sea, 590, 713-809.

JUDICIAL SALE.*Invalidated by Officer's Unauthorized Act.*

In a suit brought under a statute rendering a county officer liable to the purchaser for sale of land for taxes which have been paid, it is a good defense that the officer acted beyond his authority in receiving in payment other than cash from the purchaser, 223.

Powers of Auditor in Distribution.

In distributing funds received from judicial sale, an auditor must accept the extent of lien of a judgment, as certified to him by the custodian of the record, 504.

Title.

Purchaser of trunk afterward found to contain certain choses in action belonging to judgment debtor, did not take title, as common law rule prevails, except where changed by statute; that choses in action generally cannot be taken in execution, 59.

Reversal of decree for errors or irregularities will not affect title of purchaser in good faith, where the Court had jurisdiction to pass the decree, 628.

JUDGMENT. See *Admiralty, Attorney and Client*.**JURISDICTION.** See *Courts—United States Courts*.**JURY.***Competency of Juror.*

Membership in temperance society no disqualification in trials for violation of liquor laws, 61.

JUSTICE OF THE PEACE. See *Attachment*.**LABELS.** See *Trademarks*.

LAND. See *Real Estate Broker*.

Adjoining Owners.

One who engages in an industry on his own land and thereby injures adjoining land of another, is liable if the industry has no connection with the soil or subjacent strata, 27.

Coal Lands. See *Mines and Mining*.

Casement. See *Damages—Landlord and Tenant—Railroads*.

Emblements. See *Execution*.

Are fruits of the earth produced by annual cultivation (*fructus industriales*). They are personal property, and as such may be conveyed by parol and levied upon and sold under execution, 602.

While the intention of the common law was to include among *fructus industriales* only such products as were not annexed to the soil, but which required annual renewal, yet the modern tendency is to regard the fruits of trees which require high cultivation as *fructus industriales*, 606.

Fixtures.

There must not only be physical annexation, but a unity of title, so that a conveyance of the realty would of necessity also convey the fixture, 502.

Fructus Naturales.

Are spontaneous products of the earth requiring little or no cultivation. They partake of the realty, but become personalty upon severance therefrom, 606.

Lateral Support.

Owner of ground is liable to an adjacent owner for an injury to his right of lateral support, caused by a contractor who makes an excavation thereon, 359.

Natural Use of.

Is one having a necessary connection with the soil or subjacent strata, 27, 40.

Manufacture of coke not a natural use, 27.

Mining as a natural use of land, 44.

Partition. See *Dower*.

Where the premises are occupied according to a parol partition, such partition is a good defense to an action brought to recover the possession in violation of the partition, 631.

Ejectment will not lie to recover possession of an allotment by parol partition, as the plaintiff must rely upon a legal title and not upon an equity, 631.

Remainder. See *Liquor Laws*.

Subjacent Support. See *Eminent Domain*.

Vendor's Lien.

Where vendors of real estate endorse a promissory note to secure the balance of purchase money, they thereby waive their lien upon the land, 64.

LANDLORD AND TENANT.

Implied Covenant.

That the house is fit for immediate habitation is in a lease of a completely furnished house at a summer resort, 566.

Liability of Landlord to Third Persons.

Not liable for injuries caused by defective steps, to a person who had been in the house without an invitation, express or implied, from the tenant, 628.

Right of Action.

Owner of land can maintain action for damages for impairment of his easements by a railroad company, while his lot is in the possession of his lessee, 144.

LAW OF THE FLAG.

Ship-owner sending his vessel into a foreign port gives notice by his flag that he intends the law of that flag to regulate contracts entered into with the ship master, 193.

The intentions of the parties are the test to determine if the law is to apply. In the absence of affirmative evidence of such intention, the presumption favors the *lex loci contractus*, 194.

In English cases of affreightment, the presumption in the absence of evidence of intention favors the law of the flag. This presumption is not conclusive, 194, 195.

Effect of the Law upon Authority of Master.

Master has no greater authority to bind the ship-owner by way of hypothecation or affreightment than is conferred by the law of the flag, 195, 196.

In the United States the decisions have not been uniform; none in exact accord with the English cases, 197.

Master is authorized to deal with the cargo in accordance with the law of the flag, unless his authority has been expressly limited at the time of the agreement, 198.

Effect of the Law upon Contracts of Affreightment.

In the absence of contrary evidence, the English rule presumes the intention to have been in favor of the law, 199.

In the United States the *lex loci contractus* prevails, 199.

LEGISLATURE.

Apportionment Acts.

Acts of a legislature in apportioning its members will be declared unconstitutional where the inequalities between population and representation manifest an abuse of the limited discretion reposed in the legislature by the Constitution, 855, 856, 857, 858, 859.

But the non-apportionment of extra members to counties having the largest surplus over the representation, and awarding them to counties having a less surplus does not evince an abuse of legislative discretion, 851.

Where the Constitution requires an apportionment to be made "as nearly as may be," the abuse of the discretion thus vested must be gross to warrant judicial interference, 851.

In reviewing such an act, the courts will consider all conditions which make an equitable apportionment difficult, and the results which may follow a decision against the Act, 851.

Validity of an apportionment act may be called in question by *quo warranto*, *mandamus* or *injunction*, 861.

But in order to secure a decree, the controversy must be made against some officer whose duties are ministerial, and is therefore amenable to the power of the Court to compel execution of its judgment, 861.

Gift of Public Money.

Prohibition of, in State constitution, is violated by an appropriation for a claim for which the State is not liable, 286.

Limitations of State Power. See Constitutional Law. Power.

To declare acts done within the State unlawful or criminal is, beyond constitutional limitations, unquestioned, 213.

LEGISLATIVE AND JUDICIAL POWER, DISTINCTION BETWEEN, 433.

Separation of governmental functions in England, 423.

Differentiation of governmental powers in the United States, 435.

Judiciary's Power to Review Acts of Apportionment. See Legislature.

Although the acts of a legislature in apportioning its members are distinctly political, not legislative, they are reviewable by the courts, 854, 855.

Legislature Cannot Encroach Upon Judiciary.

Granting appeals in special cases, 439.

Interference with the course of pending cases, before judgment, 439.

Curing jurisdictional defects in judicial proceedings by subsequent legislation, 440.

Vesting judicial power in a member of the bar to try a case in which a judge is interested, 450.

Admitting attorneys to practice, 451.

Legislatures' Right to Impose Extra-judicial Duties upon Judiciary, 453.

As supervisors of election, 453.

Police judge as *ex-officio* police commissioner, 454.

As advisers to other departments of government, 456.

Powers Legislative rather than Judicial.

Organization of municipal corporations and regulations of their boundaries, 440-445.

Creation of business corporations, 448.

LIBEL. *See Slander and Libel.*

LIEN.

For Board of Horse.

Keeper of livery stable acquires no lien, where the horse was left by a bailee without authority from the owner, 566.

LIFE INSURANCE.

Beneficiaries.

Where a policy was payable to the wife of the insured, if living, and if not, then to her children; and the wife and a daughter died during insured's lifetime, the representatives of the daughter took nothing, as her interest was contingent upon survival, 567.

A policy payable to children of insured is not collectable by the administrator, where insured died before birth of children, 61.

Cancellation of Policies.

Outstanding policies issued before the passage of an Act requiring compliance therewith, or the charters of the companies to be forfeited, are not thereby cancelled, 61.

Conditions of Policy.

Provision that policy shall be void if premium is not paid when due, not affected by custom of the company to accept payment within thirty days, 221.

Premiums.

If company accepts payments of over-due premiums, thereby leading the insured to expect the condition will not be enforced, the policy cannot be forfeited for a delay in payment, 429.

Presumption as to Cause of Death.

Where the cause of death was insanity, and the insured was found dead, the circumstances of death being unknown, the presumption is that the death was natural or accidental, 807.

• LIMITATIONS, STATUTE OF. See *Equity*.LIQUOR LAWS. See *Interstate Commerce—Jury*.*Constitutionality.*

Act making it illegal to make, sell, give, etc., intoxicating liquors within a radius of three miles of a home, not made unconstitutional by vesting in the superintendent of the home authority to grant or withhold the privilege of making, etc., the prohibited articles, 501.

Damages from Illegal Sale.

Where the lessor of premises against which the action for damages is maintained has but a life estate, the estate in remainder is not liable, 903.

Evidence of Illegal Sale.

Where witness for the State cannot fix the date of any sale to which he has testified, the Court will not compel counsel for the State to elect upon which sale he would demand a conviction, 367

Social Club.

Formed to evade the liquor laws, will not be tolerated by the courts, 862.

Is subject to the provisions of a city ordinance requiring licenses to be obtained by retail liquor stores, 62.

License Law of South Carolina not applicable to *bona fide* club, 221.

Must a social club take out a license? 861, 866, 892.

Decisions upon the right of *bona fide* clubs to sell liquor without a license to members are conflicting, but those *upholding* the right, do so, (a) by regarding such furnishing of liquor to members not technically a "sale" within the meaning of the License Acts, but a distribution of property among co-owners. (b) By a liberal interpretation of the law, applying it only to persons who engage in the liquor traffic for personal profit, 863, 864, 865.

Decisions *denying* to *bona fide* clubs the right to sell liquors without a license to its members, do so, by considering such distribution a "sale" of liquors, and the wrongdoer liable to the penalties of the license and prohibition laws, 866.

MALICIOUS PROSECUTION.

Advice of Counsel.

Taking and acting upon advice of counsel rebuts the inference of malice arising from want of probable cause, 807.

Probable Cause.

What constitutes, not a question for jury, 287.

Where goods were delivered by a carrier to the vendee before payment therefor, which, it appeared, was contrary to the contract, and the vendee used and refused to pay for them, probable cause was shown for the arrest of the vendee for fraudulently contracting a debt, 368.

MANDAMUS. See *Legislature*.*Public Records.*

The weight of practice favors procedure by mandamus as the proper remedy for interference with the right of examination of public records, 770.

But the remedy is properly applicable only to cases where a single exercise only of the right is claimed, 771, 774.

MARINE INSURANCE.*Lien.*

Under general maritime law no lien exists upon a vessel for unpaid premiums, 365.

MARRIED WOMEN.

Liability on Bond. See *Conflict of Laws*.

Separate Estate.

Cannot be charged with husband's debt, simply because the wife encloses money and asks further credit from the creditor, 503.

Under a trust deed providing for a transfer by the trustee to the wife, if requested, after the husband's death, she "being discovert," the wife's right to a reconveyance is not defeated by a second marriage, 430.

Trusts.

A trust created to secure property from a husband will not be dissolved, even after divorce, where children who are beneficially interested have not consented to its termination, 64.

MASTER AND SERVANT. See *Forcible Entry—Negligence*.

The relation is purely one of State control and regulation, 500.

Dangerous Business.

Master is liable, if knowing the danger, he commands his servant to return to work, 220.

Danger incurred by employee in using steps when leaving work, not a risk of employment, 221.

Eight Hour Law.

Where by a statute work overtime by agreement is permitted for an extra compensation; yet there must be an agreement to permit recovery of wages for work over the legal eight hours, 805.

Fellow Servant.

Gangwayman employed by stevedore to unload a vessel not a fellow servant of winchman employed by ship owners, 431.

Inspector of freight cars not a fellow servant with a brakeman, 627.

Intimidation of Employees.

Equity will restrain by injunction the members of a labor union from interfering with complainant's business by intimidation of employees, 710.

Labor Union. See *Injunction*.*Liability for Servants' Act.*

An employer is not responsible for the actions of an employee who carries on an independent business and who is not subject to his control, 62.

Tort of Servant.

Liable for tort of conductor in having a passenger imprisoned, mistaking him for another, 217.

MECHANICS' LIENS.*Rights of Sub-Contractors.*

Where the contractor has stipulated that no lien shall be filed, the sub-contractor has no right of lien, 386, 430.

As affected by the contract between the owner and the original contractor, discussed, 390-403.

Constitutionality of Pennsylvania, Act June 8, 1891, providing that no contract made with the owner shall defeat right of sub-contractor to file lien, 386, 400.

Sub-contractor's right of lien is not affected by the default of the original contractor to keep his agreement with the owner to deliver the building free of all liens, entered into after the sub-contractor began work, and of which he had no notice, 710.

MERCANTILE AGENCY. See *Agency*.

MINES AND MINING.*Right of Mine Lessee to Tunnel.*

Lessee of "all the merchantable coal under a certain tract," has the right to tunnel into adjoining mine owned by him. Grant of all coal in a mine is a grant of the space occupied by the coal, 60, 61.

Water in Mines.

One who works his mine in a usual and proper manner is not liable for damages caused by water flowing into an adjoining mine by the natural force of gravitation, 41, 42.

MORTGAGES. See *Actions*.

Chattel Mortgages.

Where unrecorded and in the absence of fraud on the part of the mortgagee, take priority over a subsequent recorded mortgage given to secure a prior indebtedness, though there has been no change of possession, 57.

A subsequent agreement to substitute one article for another in the mortgage, and to such effect altering the wording, does not affect the date, 57.

Foreclosure sale of a chattel under a second mortgage does not withdraw it from the operation of the first mortgage lien, which remains unaffected until discharged by satisfaction, 499.

Decree of Sale.

A court of equity may decree a sale so as to satisfy that part of the debt which is due and as to that part not matured, preserve the lien on the property in the hands of the purchaser, 143.

Foreclosure.

When recovery on a note is barred by the Statute of Limitations, foreclosure of a mortgage given to secure payment of the note is also barred, 62.

By Married Women. See *Conflict of Laws*.

Mortgagee.

In possession, not accountable for profits which a shrewder man might have made, 430.

In Nebraska, cannot maintain ejectment, 805.

Assignee of mortgagee stands in his assignor's shoes and is entitled to a decree of a foreclosure and sale for the amount due, 805.

Pennsylvania Defeasance Act of 1881.

Since the Act, providing that defeasance must be contemporaneous with the deed, in writing, signed, sealed, acknowledged and recorded within sixty days from execution, a written defeasance, signed and contemporaneous with a deed absolute on its face, will not be admitted to convert such deed into a mortgage, 378.

Case considered: *Sankey v. Hawley*, 381.

Power to Mortgage.

Implied in power to sell generally, 18.

But not where testator intends an "out-and-out" sale, 18.

Presumption as to testator's intent, where there is a power to sell, coupled with a trust to pay debts, 19-26.

Railroad Mortgage.

Mortgage of all the property of a railroad, appurtenant to or necessary for its operation, does not cover land granted by Congress to aid its construction, 288.

Recording.

A defeasance executed contemporaneously with a deed in fee, signed but not acknowledged and recorded in accordance with the provisions of a State statute, cannot be admitted to convert such deed into a mortgage, 378.

MUNICIPAL CORPORATIONS. See *Legislative and Judicial Power.*

Are creatures of government and can have no contracts with a State legislature, 141.

Assessments.

Assessments upon abutting properties to meet expense of local improvements a valid exercise of taxing power, 366.

A city ordinance providing that personal judgment can be rendered against property owners for non-payment of assessments for improvements, violates the prohibition against taking property without compensation, 366.

Bonds.

In an action by an innocent purchaser for value, a municipality is estopped from denying allegations on the face of its bonds that they were issued according to law, 216.

Liability for Contractor's Negligence.

Municipal corporation is liable where it agrees to pay all damages caused by construction; it cannot delegate its duty to a contractor so as to relieve itself from responsibility for his negligence, 360, 361.

Liability of Selectmen.

Selectmen of a town are personally liable for negligence to one employed *directly* by them to construct a sewer, nor does the fact that the town might also be liable, relieve them, 904.

Power to Tax.

Charter power to tax "all real and personal property" in the town, does not confer power to exempt from taxation, 504.

Street Improvements.

A law assessing the cost of sewers in a district against each lot within the district in the proportion which the area thereof bears to the whole sewer district, exclusive of public highways, is constitutional, 58.

Street Railways.

The sale of a franchise to run street cars does not, in the absence of an express stipulation, prevent the city from subsequently exacting a license to run cars, 366.

Taxation of.

While the right to tax is not beyond the control of a legislature, yet it may be that a municipality cannot be deprived of its property without due process of law, 141.

Travellers on Streets.

A boy who walked into an electric wire and was injured, is not prevented from being a traveller within the meaning of a Massachusetts Statute, by the fact that just before the accident he had been playing "tag," 504.

Ultra Vires.

Municipal corporation is not liable for damages resulting from acts *ultra vires*, as excavating beyond city limits, 807.

NEGLIGENCE. See *Attorney-at-Law—Telegraph Companies.*

Contributory Negligence. See *Wilful Negligence—Admiralty.*

Attempting to get on moving street car, not *per se*, 221.

Not chargeable to an employee who has apprised his master of the danger of the work, is commanded to return thereto, and in consequence thereof is injured, 220.

Not chargeable to recipient of telegram who travels to the address given without inquiring of the company's agents, although he expected the message from another place, 223.

Of the driver of a private carriage over whom a passenger therein has no authority, does not affect the latter's right to recover against a third person whose negligence caused the injury, 711.

Counties not Liable.

For the negligence of their officers or agents, 564.

Nor for personal injuries caused by defective bridge, unless such liability is created by statute, 564.

Evidence.

In an action against a railroad company for killing an employee, defendant's evidence that deceased knew of their custom to run switch engines at an unlawful speed, is admissible as showing the risk which he voluntarily assumed, 428.

Independent Contractor. See *Land—Municipal Corporations.*

Definition, 354.

Negligence of an independent contractor cannot be imputed to his hirer, unless the act to be done is in itself unlawful, is *per se* a nuisance, or cannot be done without damage to third persons, 319, 322, 352, 357, 358.

One who is employed by a railroad company to build a bridge, the material for which is furnished by the company, who have the right to criticize the work, but not control it, is an independent contractor, who is alone liable for the negligent acts of his servants, 319.

Where a railroad company contracted with a construction company to build a road, and by the negligence of the latter company the plaintiff was injured, recovery could be had only against the construction company, 62.

Employer will be liable if, by interference or by reservation of the powers of the contract, he nullifies the contractor's independence; but not, if the power of supervision reserved is confined to seeing to the production of the intended result, 355, 356, 357.

Employer is bound to see that machinery, which he supplies to the contractor, is safe and sufficient to perform the work, 360.

Whenever there is a duty to the public or to individuals, resting upon the employer in regard to the subject-matter of the contract, he will be liable for the contractor's negligence, 360.

Cases considered: *Hole v. Railway Company*, 331.

Butler v. Hunter, 333.

Scammon v. City of Chicago, 336.

City of Chicago v. Robbins, 338.

Ordinary Care.

Rule as to, 407.

Presumption of.

There can be no presumption that a railroad company is not guilty of negligence, because the company were not required to erect gates at the crossing where the accident occurred, 431.

Negligence may be inferred, where a railroad company runs its trains within city limits at an illegal speed, 431.

Question for Jury.

"Ordinary care," as a, 408.

Negligence of employee in using icy steps when leaving work, 221.

Negligence in attempting to get on moving street car, 221.

Where a locomotive, travelling at an unlawful speed, struck a trespasser on the tracks at a place where they were open and on a public way, and where the engineer could have seen him a long distance away, but gave no signal in time, it was a question for the jury whether the negligence of the engineer was so wilful as to overcome the contributory negligence of the deceased, 255.

Where a train killed a child, 4 years old, on the track, the negligence of defendant in not keeping a reasonable look-out was a question for the jury, 368.

It is a, when state of facts is such that reasonable men may fairly differ as to whether there was negligence or not, 431.

Sale of Defective Machinery.

Vendor not liable for injuries sustained by servant of vendee, unless it is shown that he knew of the defects, 566.

Unauthorized Display of Fireworks.

A voluntary spectator cannot recover for injuries sustained where the explosion occurred without negligence, although without legal authority, 629.

Wilful Negligence.

Where defendant's conduct is reckless, the contributory negligence of the plaintiff is no defence in an action for damages, 266, 267.

PARENT AND CHILD.

Emancipation.

Minor son is emancipated by a marriage even without his father's consent, and is entitled to his earnings so far as they are necessary to support himself and family, 628.

PARTNERSHIP.

Agreement to Share Profits.

A loan of money to a firm under an agreement to receive, in addition to interest, a share of the profits, does not constitute the lender a partner, 567.

Criterion of Partnership.

Contribution of property or money to carry on a joint business for a common benefit and an ownership and sharing of the profits in certain proportions, 567.

Where three or more execute articles of incorporation under general State laws, but do not complete the organization, they are not liable as partners because one independently engages in business under the corporate name and without fulfilling the legal requirements for the management of corporations, 431.

Joint-Ownership of Land.

Joint-owners who have bought on speculation not partners, 287.

Tax on Stock.

Stock of unincorporated foreign company whose shares are transferable and commercially regarded as stock, is taxable under a statute including all stocks except U. S. stocks, 63.

PATENTS. See *Injunction.*

Infringement.

In violation of injunction, will not be restrained by attachment, where a new question concerning the patent has arisen since granting of the injunction, 222.

PLEADING.

Curing Defects.

Defective complaint cannot be cured by reliance upon defendant's answer which alleges the facts the complaint should have stated, 629.

Departure.

There can be no departure, in subsequent pleadings, where no case is made out in the complaint, 629.

POLICE POWERS.

Fisheries.

State statute prohibiting non-residents to plant or gather oysters in State waters, not an unconstitutional discrimination, but a valid exercise of the police power, 284.

Public Health.

City ordinance giving to A the exclusive right of removing dead animals, a valid exercise, 222.

PRACTICE. See *Courts—Removal of Causes.*

PRINCIPAL AND SURETY.

Change in Obligation of Bond.

Surety on cashier's bond cannot escape liability where the new duties assumed did not modify or interfere with his duties as cashier, 624.

PUBLIC RECORDS. See *Mandamus—Equity—Injunction—Corporation.*

RAILROAD COMPANIES. See *Carriers of Freight—Constitutional Law—Interstate Commerce—Mortgages.*

Contributory Negligence.

Although the train was going at an unlawful speed the plaintiff cannot recover if he could have avoided danger by stopping and looking, 563.

Slightest voluntary projection of the limbs of a passenger constitutes, 504.

Eminent Domain.

Exercise of the power will be restrained where the railroad, chartered under general State laws, is for private use, 222.

Injuries to Employees.

Not liable for, through defects in construction of side tracks, 144.

Injuries to Volunteer.

A bystander called by a head brakeman, who is without authority to employ, to assist in switching, is a volunteer and cannot recover for injuries received, 565.

Liability.

An elevated railroad is liable for impairment of easements in the highway of an abutting owner, where the road was built without condemning said easements, 144.

Liens for Supplies.

Persons furnishing supplies to a railroad are entitled to payment out of the earnings thereof before the payment of interest on the mortgage bonds, or for permanent improvements, 143.

Maintenance of Road.

Not bound to exercise the same degree of care in maintaining its side tracks as its main tracks, 144.

Mandamus.

Will not lie to compel the maintenance of a station at a particular point along its line, 221.

*Party Tickets. See Interstate Commerce.**Passenger. See Tickets.*

Five hundred dollars damages for being compelled to pay fare twice not excessive, where ejection from train was threatened, 499.

May recover damages, where compelled to pay again after having given up ticket for whole trip to another conductor, 499.

Refusal to stop train at a station not scheduled, but to which fare has been collected renders the company liable both in tort and in contract, 708.

In the absence of statutory regulations, passenger may be ejected wherever he is not unreasonably exposed to danger, 625.

Tickets. See Passenger.

The company is liable in both assumpsit and tort, where a conductor refuses to accept a ticket given by the company which describes the trip incorrectly, and ejects the passenger, who has no money to pay the fare, 63.

Company is liable, for refusing ticket on account of illegibility of date, where it was in same condition as when purchased, 625.

Right to eject passenger for non-payment of fare is not affected by his belief in his right to ride after expiration of his ticket, 625.

Company is responsible for statements of regulations concerning tickets made by conductor, 288.

Where the agent delivers an erroneous ticket to the passenger, the latter must pay his fare or be ejected from the train, and must rely upon his remedy in damages for the negligent mistake, 901.

Company is liable in damages for a conductor's refusal to accept a ticket perfect in all respects, with the exception of having lost its color by having been accidentally wet, 904.

Humiliation and shame, suffered by being obliged to pay another fare or suffer ejection, are the subjects of damages, 904.

*Trespassers on Tracks. See Negligence.**Violation of Rules.*

Riding in express car in wilful violation of rule will prevent recovery for injuries sustained therein, although the conductor, knowing the plaintiff's position did not enforce the rule, 804.

REAL ESTATE. See *Land*.

REAL ESTATE BROKERS. See *Executors and Administrators—Husband and Wife*.

Amount of Commission.

The contract governs; but where indefinite, the broker is entitled to a reasonable compensation to be determined by evidence of the price usually paid, 768.

Commissions on Exchange of Property.

A broker is entitled to a commission on an exchange; but his oral promise to charge no commission unless an exchange is effected, made without consideration after performance of his original contract to procure a purchaser, is not binding, 768.

Dividing Commissions.

Agreement between brokers and one of three purchasers, which is concealed from all the other parties, will not affect the brokers' right, where the vendor is not prejudiced, 767.

Double Commissions.

Commissions cannot be recovered from both parties, unless the double employment was known to both parties, 767.

Independent Sale by Principal.

Principal's right to sell independently of the broker always exists, but he must not sell to one who is negotiating with the agent, and must give the agent notice of his sale, 766.

Revocation of Authority.

A sale effected by one of several brokers employed respecting the same property, with notice of each others' employment, works an immediate revocation of the rights of all the others, 766.

Right to Commissions.

The right exists only when he produces a purchaser ready to comply with the principal's terms in all essential particulars, 758, 761, 762, 764, 766.

Broker is entitled to commissions if the principal accepts a sale upon terms different from those at first proposed, 759.

Broker cannot claim commissions for voluntary services; he must show authority express or implied, to prove his right, 759.

Broker for a corporation must show employment by one who can bind the corporation, or a ratification of his services in order to establish his claim, 761.

The sale must have been effected through the broker's agency, but to establish his right, the transaction need not be completed by conveyance within the limited duration of his agency, 762, 763.

It is sufficient to establish the broker's right, if one who has received knowledge of the property from him deals directly with the principal, 762.

But no right exists, where the broker fails in selling, and the principal succeeds with the same party, 762.

Nor where he secures a proposition from a party with whom the principal has been in treaty prior to the agency, 763.

But the right remains if the owner sells the property to parties with whom the agent is in treaty, unless he is ignorant of the fact; or if he changes the terms of the sale, whereby it falls through, 764, 765.

Right is not defeated by the owner's failure to inform the broker of defects in title, whereby the sale is lost; even if the commissions were to be paid out of the proceeds of the sale, 763, 764.

But the right is lost if the sale fails through the misrepresentations of the other party which leads the principal to withdraw from the transaction, 764.

Where a principal says nothing about the kind of deed he will give, and the prospective purchaser refuses to complete the contract unless the owner gives a warranty deed, which he refused as he has a good title, and the sale falls through; the broker is not entitled to commissions, 758.

Broker must act with perfect good faith, but his rights are not affected by misrepresentations innocently made which do not mislead the vendor, 767.

Where the law requires a license, it must be paid before the broker can recover commissions on sales effected, 768.

Revocation of authority will not divest broker's right, if it is made to defeat his claim, 765.

Revocation of authority of an authorized agent, without notice to a validly appointed sub-agent, will not affect the rights of the latter, 760, 765.

Sale of Option.

Which is never exercised does not entitle broker to commissions, 768.

RECIPROCITY ACTS.

Constitutionality of, 65, 173.

REMAINDER. See *Land*.

REMOVAL OF CAUSES FROM STATE COURTS.

An action to annul a judgment, where the parties are citizens of different States, can be removed only when the proceeding is an original and independent one, 59.

Where a decree is sought to be set aside on the ground of fraud, the State Court will refuse to recognize the right of removal, unless the bill in equity alleges that proof establishing the fraud was discovered after the judgment at law was rendered after the legal time for obtaining new trial had expired, and the evidence could not have been obtained by diligence within such time, 59, 60.

Where judgments have been rendered in several cases depending upon the same facts, a proceeding to enjoin the plaintiffs from taking advantage of the judgments so obtained can be removed into the Federal courts, the aggregate amount involved exceeding \$3,000, though each judgment is for less than \$500, 60.

Stay of Proceedings.

Where a case is reversed and remanded by the Supreme Court to the State Court because the latter had lost its jurisdiction by the petition for removal, the Circuit Court may use its discretion in ordering stay of proceedings until costs in the State Court are paid, 288.

RES JUDICATA.

Is the term properly applied to a judgment of a Court of last resort, in place of "*res adjudicata*" as commonly seen, 611.

RIOT. See *Forcible Entry—Master and Servant*.

Homestead Labor Riots, 556, 691.

ROADS AND STREETS.

Damages for Change of Grade.

Where a permanent grade of highway is established, the body changing the grade is liable for damages caused by the change. Cases *pro* and *contra*, 538.

Dedication of.

Use of private street by public for three years without objection by owner of fee, sufficient to show, 367.

Opening and Improving.

An owner who petitioned for the improvement of an abutting street, is estopped from claiming damages for the overflow of a water course, which was damaged by such improvement, 143.

Safe Condition.

Municipality is liable for injuries resulting from unsafe condition, even though such condition is due to negligence of a contractor 359.

RULE AGAINST PERPETUITIES, See *Conflict of Laws*.

SALE. See *Actions—Liquor Laws*.

Clubs.

There is no sale when members obtain liquor at not more than cost price, 221, 864.

Delivery.

Marking and piling lumber separately is sufficient delivery as against creditors, 223.

SET-OFF. See *Banks—Bills and Notes—Insolvency*.

SLANDER AND LIBEL.

Exemplary Damages.

In an action of slander can be recovered only where defendant was actuated by malice toward plaintiff, 630.

Ground of Action.

Action of libel may be maintained by a railroad company, without proof of special damage, for a publication charging them with such incapacity and negligence in their business as would induce shippers to refrain from employing them, 144.

Implication of Malice.

Malice is implied where the words spoken impute a crime, and are reiterated on the stand after their falsity has been shown, 630.

Publication.

Where a wife opened a letter and read it with her husband, the publication of the libel was her own act and she could not recover. Husband and wife are distinct persons in respect to the publication of a libel, 503.

SPIRITUALISM. See *Deeds—Deceit—Wills*.

The effect of the belief upon conveyances *inter vivos*, 504.

The effect of the belief upon testamentary dispositions, 569.

STARE DECISIS.

A new method of avoiding the rule suggested, 489.

STATUTE.

Object.

Act "to encourage cultivation of ramie," providing appropriations "to encourage cultivation, etc.," and "for purchase of ramie," is invalid under California Constitution prohibiting more than one item of appropriation in bills making appropriations of money, 500.

Validity.

An ordinance prescribing both fine and imprisonment for its violation, and providing that the license and money paid therefor shall remain forfeited, although an acquittal should take place upon appeal and trial *de novo*, is void as being oppressive and unreasonable, 568.

STATUTE OF FRAUDS. See *Conflict of Laws*.

SUNDAY LAWS. See *Contracts*, 723.

TAXATION. See *Interstate Commerce—Constitutional Law*.

Equality of.

Equal when paid exclusively by those for whose benefit the money collected is expended, 217.

Legislative Control.

Right of, not such a vested right of property as to be beyond control of the legislature, 141.

Public Purpose. See *Constitutional Law*.

Grant of money for benefit of a destitute person, not for a public purpose, 312.

But laws for the benefit of the poor in general, or dealing with poverty of certain kinds, are for a public purpose, 313.

TELEGRAPH COMPANIES.

Negligence.

Where a message is sent to A. in care of B., and B. cannot be found, the company is liable in damages to A. when an effort to find A., if made, would have been successful, 144.

Transmission of Messages.

Error calling person addressed to wrong place not excused because message was unrepeatable, as the condition as to unrepeatable messages applies only to the sender, 223.

TRADE-MARKS.

Counterfeiting Labels.

Labels are entitled to protection where they are so successfully counterfeited that those purchasing with the usual degree of care are deceived, 631.

Word.

"Celluloid" being originally a fancy and arbitrary name, is a valid trade-mark; but its use in connection with a totally different substance, will not be enjoined, 64.

TREASON.

"Levying War."

Opposition to the enforcement of law by force, numbers or intimidation, to be treason, must have for its object a public, and not a private purpose, 694, 698.

Organized resistance to State authority, as the criterion, 696.

TRUST COMBINATIONS. See *Corporations*.

TRUSTS AND TRUSTEES.

Charitable.

Depend upon the common law of England for their origin, 237, 239, 243, 244, 245, 246.

Indefiniteness in objects, immaterial in charitable trusts, 238, 241.

Cy pres doctrine, its true meaning and application, 249, 251, 252.

Cy pres doctrine not recognized in New York, therefore there must be a recognized beneficiary who can enforce the trust. (See "Decision in *Tilden v. Green*," p. 235), 75, 79, 123, 125, 126, 127.

Vagueness, indefiniteness and uncertainty in the objects will not invalidate, provided a discretionary power exists in a trustee to supervise the application of the fund, and the gift is to a technical charitable purpose, 124.

When the discretion of some one is essential to create a beneficial right, and the trustee is precluded from exercising it for his own benefit, the devise is void unless the object is charitable, 522, 524.

Rule in Morice v. Bishop of Durham, 522.

In Connecticut a bequest to general charitable purposes, without naming a beneficiary, is void, 128.

A devise of a residuary estate in trust for an institution not in existence, with a discretion vested in the trustees, if they shall deem its incorporation inexpedient, to use the fund for such charitable purposes as will render it most beneficial to humanity, is invalid, as designating no beneficiary who can enforce the trust, and vesting entire power in the trustees to give or withhold the fund. (See *Tilden v. Green*, p. 235), 75.

Legality of.

Where legal or illegal testamentary trusts are so connected that the rejection of the illegal would defeat the testator's intention, or do injustice to the beneficiaries, all must be held illegal and fall, 75, 84, 98.

Loss of Investment.

Loss of portion of trust fund by insecure investment, should be apportioned between life tenant and remainder-man, in proportion in which the principal sum of the investment bears to the interest due thereon when the investment is realized upon, 432.

Mingling Trust Funds. See Assignments.

Where a trustee of funds allows a firm to which he belongs to use them without giving security, although their loan was authorized only upon real estate security, and the firm, becoming insolvent, first execute a mortgage to secure the funds, and then make an assignment, the preference is void, and the *cestui que* trust stands in the position of a simple contract creditor, 711.

Powers in Trust.

To render valid, there must be certainty of object, 116, 237.

Purchase of Trust Property.

A trustee may not purchase from his *cestui que trust* unless their relations have been dissolved, and he has communicated to his vendor all his knowledge of the property's value, 744.

Trustee is not permitted to purchase for others, 745.

Where the trustee becomes personally interested in the purchase, the sale will be set aside whether it was made by virtue of the trustee's power or under the supervision of the court, 745.

But in Tennessee sales under judicial supervision are excepted, 746.

Where the *cestui que trust* seeks to have the sale of property purchased by the trustee set aside, the court will receive no evidence to show the *bona fides* of the transaction, 745.

In Texas and Missouri, executors and administrators may not purchase their decedents' estates; but in South Carolina the rule is otherwise, 746.

But in Missouri administrators may purchase at adverse sales, 749.

In Alabama, South Carolina and Texas, a trustee who is beneficially interested may purchase the trust property at public sale; and (probably), also a preferred creditor who is trustee for the payment of debts, but not where the deed of trust provides for the payment of creditors ratably, 747.

Where the sale is under adversary proceedings the general rule is that the trustee may not purchase, 748.

But in Pennsylvania, purchases at such sales have been permitted on the ground that the trustee has then no duty to perform in regard to the trust property, 748.

The Pennsylvania exception has been narrowed by decisions requiring perfect good faith respecting the sale as a condition to the validity of the trustees' title, 740, 748, 749.

A trustee may acquire an indefeasible title at his own sale, by (a) a new contract with the c. q. t., divesting him of the character of trustee, but under the supervision of the Court; or (b), he may file a bill asking leave of the Court to become a bidder, 750.

UNDUE INFLUENCE. See *Deeds—Wills*.

UNITED STATES COURTS.

Circuit Courts of Appeal, 45.

Habeas Corpus.

May review upon *habeas corpus*, at any time before removal of prisoner, the action of State executive in issuing warrant of rendition, 429.

Upon *habeas corpus*, a Federal Court may examine an indictment found in another circuit against a prisoner who is awaiting removal, so far as to be satisfied that the offense is one that may be tried in the former to which the accused is sought to be removed, 710.

Jurisdiction.

S. C. U. S. has no jurisdiction over appeals from C. C. U. S.: in cases dependent upon adverse citizenship, 143.

S. C. U. S. has a right to review action of State Court where the conclusions of the latter involve the denial of a privilege under the Constitution and laws of United States, 285.

S. C. U. S. has jurisdiction as to all plaintiffs claiming under a title whose validity is involved in the determination of the cause, where the whole amount involved exceeds \$5,000, although none of the individual claims exceed that sum, 288.

Jurisdiction of S. C. U. S. over cases concerning rights to State political offices, 405.

Jurisdiction of Circuit Courts of Appeal in cases arising under the Chinese Exclusion Acts, 48.

C. C. U. S. has jurisdiction over suits brought by receiver of a national bank without regard to the amount involved, 61.

Where a person is in custody by a judgment of a State Court under a State statute, jurisdiction of United States courts extends to the inquiry, upon *habeas corpus*, into the constitutionality of such statute, 61, 62.

Stay of Proceedings.

Cannot stay proceedings in a State Court, but as between the parties before it may enjoin the plaintiffs from enjoying an inequitable advantage obtained by a judgment therein, 60.

Will issue injunction to restrain execution of State law, only where complainant shows the unconstitutionality of the law and makes out a case cognizable in equity, 218.

Writ of Prohibition.

S. C. U. S. will not issue writ of prohibition to restrain a lower Court from executing its sentence, where the application was made after judgment and sentence, and no want of jurisdiction appears upon the face of the proceedings; nor, where to grant the writ would be to review the actions of the government in a question pending between it and a foreign power, 367.

WILLS.

Ambiguity.

Where a bequest was claimed by two institutions, evidence that

testator was interested in the church which managed one of them was admissible to show his intention, 224.

Bequests Valid Where Made. See *Conflict of Laws*.

Bequests Charged on Land.

Legacies are charged on the land where the testator made no specific devise of the real estate, but by including both his realty and personalty in the residuary clauses, showed his intention to treat them as a common fund, 808.

Construction of.

Where testator, having left children and step-children, had described the latter in a bequest, they had no participation in the residue left to "my wife and children," 224.

Grant of estate in fee is reduced to an estate for life by a subsequent clause giving a remainder upon the contingency that the estate shall not be disposed of during the life of the grantee, 64.

Memorandum.

Written in past tense, called "nuncupative," and signed above figures which formed no part of the will, is valid, 287.

Powers. See *Conflict of Laws*.

Where the decree of a power to dispose of land by deed or will executed the power by will and subsequently executed a deed, which was rescinded by a reconveyance, the prior execution remained in full force, 712.

In New York a general bequest passes property over which testator had a power of appointment; but in Rhode Island the intent to execute the power must appear affirmatively, 629.

Undue Influence.

To avoid a will the undue influence must so constrain the testator's volition that he is prevented from following his own inclinations, 577.

Where the insane delusion of a testator does not appear to have influenced his disposition of his property, his will is valid, 569.

While a belief in the preternatural is not *per se* an insane delusion, yet it may amount to such where it does not permit the free exercise of the will, 573, 581, 582, 588, 589.

If the spiritualistic or other religious belief of the testator appears to have appreciably affected the provisions of his will, the presumption of undue influence is created, 577.

For the presumption to attach it sufficient if there is a likelihood of some remote benefit to accrue, provided the contingency is not too remote, 580.

Where a spiritual adviser or a spiritualistic medium has procured a benefit for himself, or a third person by playing upon the testator's preternatural beliefs, or by virtue of his relation to the testator, the exercise of undue influence is presumed, and the burden of proving the contrary is upon the beneficiary, 574, 576, 579, 588.

Where the spiritual adviser draws up the will himself, or has it drawn up and is present at its execution, the presumption of undue influence is strongest; and when the facts are contrary the presumption is correspondingly weak, 578, 581.

WRITS.

Amendment of Return.

After a sheriff or deputy has gone out of office, he cannot amend a defective return made while in office, without an order of court, 630.

